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No. _____

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IN THE

Supreme Court of the United States

October Term, 1992

CONSOLIDATED RAIL CORPORATION,
Petitioner,

vs.

GEORGE R. STOWERS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a railroad yard engineer operating a locomotive and responsible for spotting, moving and locking coal-filled railroad cars into a mechanical dumper at dockside and away from the dumper after the car's cargo has been emptied into a ship, is engaged in "maritime employment" under the Longshore And Harbor Workers Compensation Act, 33 U.S.C. §902(3), where the railroad cars themselves are integral components used in the loading process?

2. Whether a railroad yard engineer injured at a "marine railway" situs while moving damaged railroad cars in need of repair as a result of the loading process is engaged in "maritime employment" under the LHWCA?

3. Whether the United States Sixth Circuit Court of Appeals erred in holding that a railroad yard engineer who operates equipment that is a component part of a cargo loading process was not as much an integral part of the process of loading and unloading a ship as railroad laborer who repairs, maintains and cleans equipment essential to the loading of ships as held in *Chesapeake & Ohio Railway Co. v. Schwalb,* 493 U.S. 40 (1989)?

RULE 29.1 STATEMENT

The Petitioner, Consolidated Rail Corporation, has the following subsidiaries and affiliates:

CRR Industries, Inc.

CRC Properties, Inc.

Akron & Barberton Belt RR. Co.

Pitts., Chart. & Yough. Rwy. Co.

Indiana Harbor Belt RR. Co.

Albany Port Railroad Corp.

Railroad Assoc. Insurance, Ltd.

Calumet Western Railway Co.

Lakefront Dock & RR. Term. Co.

Transportation Data Xchge., Inc.

Merchants Desp. Trans. Corp.

Mich. Fay., & Greenb. RR. Co.

Trailer Train Co.

Monongahela Railway Co.

Peoria & Pekin Union Rwy. Co.

Calpro Company

St. Lawrence & Adiron Rwy. Co.

Peoria Midwest Transp. Corp.

Railbox Company

Belt Railway Co. of Chicago

Penn Central Communications Co.

Railgon Company

Chicago & Western Indiana Rwy. Co.

CRR Credit Corp.

CRR Investments, Inc.

PD Land Services, Inc.

CG Products, Inc.

Conrail Mercury, Inc.

Concord Resources Group, Inc.

CG Lockport

CU Energy Partnership LP

General American Insurance Co.

Concord Canada, Inc.

Land Acquisition Services, Inc.

CR Quality Services, Inc.

Soretox, Inc.

NY Land Acquisition Services, Inc.

Stablex Canada, Inc.

Stablex Filtration, Inc.

Black Hawk Development, Inc.

Incinerator Proj. Joint Venture

TABLE OF CONTENTS

QUESTIONS PRESENTED i

RULE 29.1 STATEMENT ii

TABLE OF AUTHORITIES viii

OPINIONS BELOW 1

JURISDICTION 2

STATEMENT OF FEDERAL STATUTES AT ISSUE 3

STATEMENT OF THE CASE 5

A. Procedural Facts 5

B. Statement Of Facts Material To Questions Presented 6

C. The Sixth Circuit Opinion 9

D. Judge Brown's Dissent From The Majority Opinion 12

REASONS FOR GRANTING THE WRIT OF CERTIORARI 13

A. If, Under *Schwalb*, Railroad Employees Who Repair, Maintain and Clean Equipment Essential To The Loading Or Unloading Process Are Engaged In "Maritime Employment" Under 33 U.S.C. §902(3), Then Railroad Locomotive Engineers Who Operate Equipment (Railroad Cars) That Are Component Parts Essential To The Loading And Unloading Process Must Also Be Covered 14

B. The Sixth Circuit's Decision Is Premised On An Analytical Framework That Has Been Expressly Rejected In *Schwalb*, *P.C. Pfeiffer*, And *Caputo* 17

C. The Sixth Circuit Holding Resurrects The "Point Of Rest" Doctrine Rejected In *Caputo* 20

D. The Sixth Circuit's Holding Is Contrary To The Broad Remedial Purposes Of The 1972 Amendments Of The Act Which Were Intended To Include Many Land-Based Activities At A Covered Situs 21

E. The Sixth Circuit's Holding Presents A Conflict With Other Circuit Courts Of Appeal And With A State Court Of Last Resort 23

CONCLUSION..... 27

APPENDIX:

Decision of the Court of Appeals for the Sixth Circuit (February 8, 1993) A1

Memorandum and Order of the United States District Court (February 4, 1992) A16

Order of the United States District Court (February 4, 1992) A24

Order of the United States Court of Appeals for the Sixth Circuit Denying Petition for Rehearing (April 6, 1993) A25

33 U.S.C. §901 ..... A27

33 U.S.C. §902 ..... A27

33 U.S.C. §903 ..... A33

33 U.S.C. §904 ..... A35

45 U.S.C. §51 ..... A36

45 U.S.C. §56 ..... A37

Terry Lee Patterson v. CSX Transportation, Inc., 1993 Va. LEXIS 62 (April 16, 1993) A38

Joseph K. Sixbey v. Norfolk and Western Railway, 1988 U.S. Dist. LEXIS 17986 (April 4, 1988) ... A45

Elmer R. Richards v. Norfolk and Western Railway Company and Chesapeake & Ohio Railway Company, and Trailer Train Company, 1987 U.S. Dist. LEXIS 15674 (October 30, 1987) A52

Excerpt, Deposition Transcript of Respondent George R. Stowers, page 35 ..... A69

TABLE OF AUTHORITIES

Cases:

Chesapeake & Ohio Railway Co. v. Schwalb, 493 U.S. 40 (1989) ..... *passim*

Conligio v. Norfolk & Western Ry. Co., 670 F. Supp. 1353 (E.D. Mich. 1987) 11,25

Conti v. Norfolk & W. Railway Co., 566 F.2d 890 (4th Cir. 1977) 9,10,17,18,24

Elmer R. Richards v. Norfolk & Western Ry. Co., et al., unreported, No. 86-CV-74028-DT, 1987 U.S. Dist. LEXIS 15674 (D.C., Mich. October 30, 1987) 11,25,26

Harmon v. Baltimore & Ohio Railroad Co., 741 F.2d 1398 (D.C. 1984) 12,17,21,23,24

Hayes v. CSX Transportation, Inc., 985 F.2d 137 (4th Cir., January 22, 1993) 11,25

John K. Sixbey v. Norfolk & Western Ry. Co., unreported, C.A. No. 87-CV-60145-AA, 1988 U.S. Dist. LEXIS 17986 (D.C., Mich. April 4, 1988) ... 11,25

Merril v. Chicago Illinois Midland Railway Co., 751 F. Supp. 770 (C.D. Ill. 1990) 11,25

Norfolk & Western Railway Co. v. Goode, 493 U.S. 40 (1989) 5,14,15,16

Northeast Marine Terminal Co., Inc. v. Caputo, 432 U.S. 249 (1977) ..... *passim*

P.C. Pfeiffer Co., Inc. v. Ford, 444 U.S. 69 (1979) ..... *passim*

Patterson v. CSX Transportation, Inc., No. 921044, 1993 Va. LEXIS 62 (Virginia Supreme Court, April 16, 1993) 11,24,25

Pennsylvania Railroad Co. v. O'Rourke, 344 U.S. 334 (1952) 11,25

Stockman v. John T. Clark Son of Boston, Inc., 539 F.2d 264 (1st Cir. 1976), *cert. denied*, 433 U.S. 908 (1977) 10,22

Stowers v. Consolidated Rail Corporation, 985 F.2d 292 (February 8, 1993), *rehearing denied* (April 6, 1993) 8,9,10,11,12,16,18

Vogelsang v. Western Maryland Railway Co., 670 F.2d 1347 (4th Cir. 1982) 11,25

Statutes:

28 U.S.C. §1254(1) 2

33 U.S.C. §901 *et seq.* 2,3,5

33 U.S.C. §902(3) 3,13,14,15,16

33 U.S.C. §902(4) 3,13

33 U.S.C. §903(a) 14

33 U.S.C. §905(a) 3,6

45 U.S.C. §51 2,5

45 U.S.C. §56 5

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Opinion of the United States District Court for the Northern District of Ohio, Eastern Division granting summary judgment in favor of Petitioner, Consolidated Rail Corporation, was issued on February 4, 1992. The opinion is reprinted in the Appendix at A16 and the order is set forth in the Appendix at A24.

The Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit reversing the judgment of the District Court was issued on February 8, 1993 and is reprinted in the Appendix at A1. Petitioner's Petition For Rehearing and Request For *En Banc* Rehearing were denied by Order dated April 6, 1993 and is set forth in the Appendix at A25.

JURISDICTION

Respondent asserted subject matter jurisdiction in the United States District Court for the Northern District of Ohio under the Federal Employers Liability Act (FELA), 45 United States Code §51 *et seq.* The District Court found that it lacked subject matter jurisdiction pursuant to Longshoreman and Harbor Workers Compensation Act, 33 U.S.C. §901 *et seq.*

Respondent[1] timely appealed to the United States Court of Appeals for the Sixth Circuit in accordance with 28 United States Code §1291. The Court of Appeals reversed the judgment of the lower court in a written opinion and Judgment Order dated February 8, 1993. A timely filed petition for rehearing and request for rehearing *en banc* were denied by the Court of Appeals on April 6, 1993.

The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 United States Code §1254(1) and in accordance with Rule 10 of the Rules of the Supreme Court of the United States.

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[1] The only parties to this proceeding are petitioner, Consolidated Rail Corporation and respondent, George R. Stowers, as they appear in the caption.

STATEMENT OF FEDERAL STATUTES AT ISSUE

This Petition for Writ of Certiorari involves the construction and application of the 1972 Amendment to the Longshore And Harbor Workers Compensation Act (LHWCA), 33 U.S.C. §901 *et seq.* Specifically, this Petition involves the following statutory provisions:

1. Section 2(3) of the LHWCA, 33 U.S.C. §902(3), which defines an "employee" as follows:

> (3) the term "employee" means any person engaged in maritime employment including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, ship builder and ship-breaker, but such term does not include [certain categories of individuals not germane to this appeal].

2. Section 2(4) of LHWCA, 33 U.S.C. §902(4) which defines an "employer" as follows:

> (4) the term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel).

3. Section 5(a) of LHWCA, 33 U.S.C. §905(a), which provides an exclusive remedy to "employees" covered by the Act, as follows:

> (a) Employer liability: failure of employer to secure payment of compensation.
>
> The liability of an employer prescribed in §904 of this title shall be exclusive and in place of all their liability of such employer to the employee, his legal

representative, husband or wife, parents, dependents, next of kin and any one otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from an injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action, the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employer assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee. For purposes of this subsection, the contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 904 of this title.

STATEMENT OF THE CASE

A. Procedural Facts.

Plaintiff-respondent George Stowers filed this action in the United States District Court for the Northern District of Ohio under the Federal Employer's Liability Act, 45 U.S.C. §§51, 56, seeking damages for personal injuries sustained during the course of his employment for defendant-petitioner Consolidated Rail Corporation (hereinafter, Conrail). Respondent was employed by Conrail at its Coal Dock and Harbor Yard facility on the Ashtabula River in Ashtabula, Ohio.

Conrail moved for summary judgment on the ground that respondent's exclusive remedy was under the Longshore And Harbor Workers Compensation Act (hereinafter, LHWCA or the Act), 33 U.S.C. §901 *et seq.*, and that the District Court, therefore, lacked subject matter jurisdiction. Conrail contended that its' and respondent's activities at the Harbor Yard met the "situs" and "status" requirements of the 1972 Amendments to the LHWCA as set forth in this Court's decisions in *Northeast Marine Terminal Co., Inc. v. Caputo,* 432 U.S. 249 (1977), *P.C. Pfeiffer Co., Inc. v. Ford,* 444 U.S. 69 (1979) and *Chesapeake & Ohio Railway Co. v. Schwalb,* 493 U.S. 40 (1989) (Decided together with *Norfolk & Western Railway Co. v. Goode,* 493 U.S. 40 (1989)).

The District Court granted Conrail's Motion for Summary Judgment, holding that respondent's responsibilities for the movement and operation of railroad cars used in the loading and unloading process met the Act's "status" requirement. The District Court determined that respondent

> participated in the overall loading process. His primary purpose as a yard engineer was to move loaded and unloaded cars between land and water transportation. If Stowers stopped performing these tasks, the overall loading process would cease. Accordingly, this Court concludes that Stowers was engaged in maritime employment, as defined by the LHWCA.

App. A21.[2]

Respondent appealed to the United States Court of Appeals for the Sixth Circuit. On February 8, 1993 a three judge panel, in a split 2-1 decision, reversed the judgment of the District Court. The majority held that respondent was not engaged in "maritime employment" for the purposes of LHWCA because he was performing "traditional railroad" duties that were "the same as they would have been at any other railroad switchyard servicing any other type of industry in which railroad cars are loaded and unloaded by another trade, employer or business entity." 985 F.2d at 297; and that respondent was, therefore, "not engaged in an 'essential or integral' part of the ship loading process." *Id.*

B. Statement Of Facts Material To Questions Presented.

The respondent is a railroad locomotive engineer employed by Conrail at its Harbor Yard facility. The sole function of the Harbor Yard is to service two docks in the loading and unloading of cargo to and from ships

[2] The District Court also concluded that respondent's employment at the Harbor Yard met the "situs" requirement since the Harbor Yard is a "marine railway" and the injury occurred "in an . . . adjoining area customarily used for loading or unloading . . . vessels" under 33 U.S.C. §905(a) (App. A22).

operating on the Great Lakes.[3] The principal cargo loaded onto vessels is coal transported overland from West Virginia and Pennsylvania.

The Harbor Yard operations for loading and unloading ships are strikingly similar to the loading activities described by this Court in *Schwalb, supra*, 493 U.S. at 42-43. The coal is contained in railroad cars transported to the Harbor Yard by railroad "road crews", which drop off the coal cars at the Harbor Yard. At that point the overland transportation of coal ends. "Switchyard crews" then begin the assembly of cars for unloading into ships at the dock.

As a Yard Engineer and member of the "switchyard crew", respondent's primary responsibilities were to spot, assemble and move the coal cars into and away from a large dockside mechanical "Dumper." Respondent's occupational tasks were described by the Sixth Circuit as follows:

> Once the coal-filled cars reached the yard, Stowers, as the locomotive engineer of the switchyard crew, reassembled the cars to make up new trains that he then pulled to the docks. *At the dock, Stowers would lock the coal-filled cars into a mechanical "dumper"* and Conrail Coal Dock employees would operate the dumpers to dump the coal into the conveyor belts that carried the coal directly to the ships. *Stowers would then pull the empty cars back to the yard.* In addition, when incoming ships loaded

[3] Coal dock workers and the Harbor Yard workers load coal onto the ships. All cargo handled at the yard is either going on board ships or has been off-loaded from ships. Conrail owns the Harbor Yard facility and the coal dock. The operation of the coal dock is intertwined in function with the Harbor Yard. Although Yard supervisors do not supervise the dock employees, the dock supervisors can supervise yard employees. Conrail is the employer of all Coal Dock workers and all Harbor Yard workers.

> with iron would arrive, Stowers would bring a train of empty cars to the dock, where Pinney Dock employees would fill the railroad cars with iron ore. Stowers, or members of his crew, would then haul the loaded cars back to the yard. All of the loading equipment was operated and maintained by Coal Dock employees. Stowers' only contact with the loading equipment was to position railcars in the dumpers and haul them away.

985 F.2d at 293 (emphasis added) (App. A2-A3).

Respondent also worked in the Harbor Yard's "backtrack" area where railroad cars are classified and separated. Cars in need of repair as a result of damage inflicted by the mechanical dumper are separated from other cars. Respondent was injured on March 21, 1991 while working in the backtrack area when he drove his locomotive over a derailer while separating damaged railcars.

Respondent's job at the Harbor Yard is part of an integrated process for unloading coal from railroad cars into ships. It is critical to note that the coal-filled cars themselves serve as cargo containers. When the cars are moved and locked into place at the mechanical Dumper by respondent and his switchyard crew, the cars are then physically lifted off the railroad tracks by the Dumper, turned upside down, and their contents emptied into a hopper which passes the coal via a conveyor belt directly into the ship's hold. *Thus, the railroad cars are a component of the Dumper's operation.* Once emptied, the railroad cars are replaced on the track by the Dumper. Respondent's activities in the loading process continue by his removal of the empty cars from the Dumper for reassembly in the yard.

Simply put, yard engineers, such as respondent, are directly involved in the loading of coal into ships. The movement of railroad cars into and away from the Dumper is an essential and integral part of the ship loading process. Without respondent performing his job, *the loading process would cease.* Indeed, at his deposition, respondent conceded:

> Question: Now, at the Harbor Yard, if you don't do your job and take these coal cars away, what would happen to these coal cars?
>
> Answer: They would probably plug the [Dumper] machine, you know.
>
> * * * * *
>
> Question: My point is, that engine is necessary for that ship loading to continue, is that right? Either you running it or somebody else running it?
>
> Answer: Yes.

App. A69-A70.

The loading process ends when the Yard Engineer leaves the empty cars for further transhipment overland by a road crew.

C. The Sixth Circuit Opinion.

The Sixth Circuit, as its critical point of departure, attempted to make the distinction that respondent was not engaged in "traditionally maritime" work, but rather was "engaged in the unloading of a coal train, not loading a vessel." 985 F.2d at 296 (App. A8-A9) (*quoting from, Conti v. Norfolk & W. Railway Co.*, 566 F.2d at 895

(4th Cir. 1977)). The appellate court adopted the Fourth Circuit's holding in *Conti*, quoting with approval the following reasoning:

> "It is clear that . . . *the occupations of the plaintiff were not of a traditional maritime nature*, but on the contrary were those traditionally associated with railroading. Their tasks and responsibilities with respect to the unloading of the coal from the hopper cars would have been the same at an inland terminal as they were at Lambert's Point and *the sophisticated automation of the facility at the latter terminal should not obscure the basic fact that the plaintiffs were engaged in unloading a coal train, not loading a vessel.* We find nothing in the Amendments or the legislative history to indicate that under these circumstances that Congress intended to transfer the redress of such injured railroad workers from the FELA to the Long Shoreman's Act."

985 F.2d at 295 (App. A7) (quoting from *Conti*, 566 F.2d at 895 with emphasis added by panel majority).

The Court further eschewed extending LHWCA coverage to respondent's job activities "simply because the Supreme Court favored a liberal application of the LHWCA provisions." *Id.* at 296. Rather, it reasoned that by enacting the 1972 Amendments, Congress

> "did not see itself as including under the Act whole new groups and classes of employees. Coverage was still to be geared only to persons who loaded and unloaded vessels . . . and who fit such traditional maritime designations as longshoreman, harbor worker, and the like."

985 F.2d at 296 (App. A10) (quoting with approval from *Stockman v. John T. Clark Son of Boston, Inc.*, 539 F.2d 264, 276 (1st Cir. 1976), *cert. denied*, 433 U.S. 908 (1977)).

The appellate court then concluded that since respondent's duties "involve[d] [a] railroad classification in a railroad yard," his employment did not meet the "status" requirement established by this Court in *Caputo, P.C. Pfeiffer* and *Schwalb.* The Court stated:

> Not surprisingly, we have found no case in which a court has found that a railroad worker (or, as in this instance, a locomotive engineer) whose duties involve [a] railroad classification in a railroad yard is held to be a maritime worker under the LHWCA.[4] . . . The switchyard's crew duties were part of the first or last stage of the overland railroad shipment of cargo. The crew's duties were the same as they would have been at any other railroad switchyard servicing another type of industry in which railroad cars are loaded and unloaded by another trade, employer, or business entity. Stowers did not participate in the loading or unloading of the ships, or even of the railcars, and therefore he certainly was not engaged in an "essential or integral" part of the ship loading process.

985 F.2d at 297 (App. A11).

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[4] *But cf., Pennsylvania Railroad Co. v. O'Rourke,* 344 U.S. 334 (1952); *Hayes v. CSX Transportation, Inc.,* 985 F.2d 137 (4th Cir., January 22, 1993); *Vogelsang v. Western Maryland Railway Co.,* 670 F.2d 1347 (4th Cir. 1982); *Conligio v. Norfolk & Western Ry. Co.,* 670 F. Supp. 1353 (E.D. Mich. 1987); *Merril v. Chicago Illinois Midland Railway Co.,* 751 F. Supp. 770 (C.D. Ill. 1990); *John K. Sixbey v. Norfolk & Western Ry. Co.,* unreported, C.A. No. 87-CV-60145-AA, 1988 U.S. Dist. LEXIS 17986, United States District Court, Eastern District of Michigan, Southern Division (April 4, 1988) (App. A45); *Elmer R. Richards v. Norfolk & Western Ry. Co., et al.,* unreported, No. 85-CV-74028-DT, 1987 U.S. Dist. LEXIS 15674, United States District Court for the Eastern District of Michigan, Southern Division, (October 30, 1987) (App. A52); *Patterson v. CSX Transportation, Inc.,* No. 921044, 1993 Va. LEXIS 62 (Virginia Supreme Court, April 16, 1993) (App. A38), discussed *infra,* pp. 23-26.

D. Judge Brown's Dissent From the Majority Opinion.

Judge Brown dissented from the panel majority opinion because respondent's work was "essential to the loading or unloading process" under *Schwalb*. 985 F.2d at 298. First, the dissent noted the incongruity of the majority opinion that had respondent been injured while spotting a full coal car in the mechanical dumper or removing an empty car from the dumper, he would have been covered under the Act as "part of the loading crew." *id.* at 298; but, under the majority's analysis, would not be covered while moving empty cars in the "backtrack" area away from the loading process. This was, according to the dissent, inconsistent with the Act since "[a] primary purpose of the 1972 amendments was to do away with the phenomenon of employees who, in performing their duties, moved in and out of coverage under the LHWCA. *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 75-76, 100 S.Ct. 328, 333, 62 L.Ed. 2d 225 (1979)." 985 F.2d at 298.

Second, the dissent criticized the majority opinion in light of *Schwalb's* instruction that "the legislative history of the 1972 amendments shows that Congress intended the LHWCA to be liberally construed in favor of coverage." 985 F.2d at 298. The dissent further noted that the panel majority opinion was in conflict with the decision in *Harmon v. Baltimore & Ohio Railroad Co.*, 741 F.2d 1398 (D.C. 1984).

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The Sixth Circuit judgment is flatly inconsistent with the holding and analysis set forth by this Court in *Chesapeake & Ohio Railway Co. v. Schwalb*, 493 U.S. 40 (1989), and represents a shot across the bow of this Court's prior jurisprudence construing the 1972 Amendments of the Act in *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249 (1977); *P.C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69 (1979). The Sixth Circuit judgment substantially restricts the intended scope of the Act's coverage of activities taking place at a dock on a marine railway situs. As a result, thousands of railroad workers at marine railway facilities on the Great Lakes will be denied coverage under the Act.

"Maritime employment" under the 1972 Amendments of the LHWCA was fundamentally expanded to include many job tasks at a marine "situs" *at* and *shoreward of* the dock, as long as the worker was "involved in the essential elements of [loading] or unloading a vessel" and thereby engaged "in the handling of cargo as it moves between sea and land transportation . . ." *Caputo, supra*, 432 U.S. at 267.

The LHWCA is the exclusive remedy for work related injuries as long as the plaintiff meets both the "situs" and "status" requirements. The situs test[5] is met

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[5] The Sixth Circuit panel majority did not dispute that Conrail's activities at the Harbor Yard met the "situs" test since the entire facility serves as a "marine railway" used solely for loading and unloading cargo to and from vessels on the Great Lakes. Conrail qualifies as a maritime "employer" under Section 2(4) of the Act. 33 U.S.C. §902(4). *See*, dissent of Judge Brown, 985 F.2d at 298. The only issue addressed by the panel majority opinion and raised in this Petition is respondent's status as an employee "engaged in maritime employment . . ." within the meaning of 33 U.S.C. §902(3).

where, pursuant to 33 U.S.C. §903(a), the employee's disability

> . . . results from an injury occurring upon navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel).

The status test is satisfied when, pursuant to 33 U.S.C. §902(3), the employee qualifies as

> . . . any person engaged in a maritime employment, including a longshoring or other person engaged in longshoring operations, and any harbor worker including a ship repairman, ship building and ship breaker . . .

A. If, Under *Schwalb*, Railroad Employees Who Repair, Maintain And Clean Equipment Essential To The Loading Or Unloading Process Are Engaged In "Maritime Employment" Under 33 U.S.C. §902(3), Then Railroad Locomotive Engineers Who Operate Equipment (Railroad Cars) That Are Component Parts Essential To The Loading And Unloading Process Must Also Be Covered.

Conrail's employment of respondent at the Harbor Yard is indistinguishable from the jobs performed by the railroad employees determined in *Goode* and *Schwalb* to meet §902(3)'s "status" requirement. In *Schwalb*, two railroad laborers were injured while cleaning trunion rollers located beneath conveyor belts that carried cargo emptied from railroad cars in a "mechanical dumper". The conveyor belts carried the coal directly to the holds of ships at the Chesapeake and Ohio dock terminal in Newport, Viriginia.

In *Goode*, the plaintiff was a pier machinist at the Norfolk and Western coal handling terminal in Norfolk, Virginia. His responsibility was to "maintain and repair loading equipment, including the dumpers and conveyor belts." 493 U.S. at 43. Goode was injured while repairing a "retarder" on one of the mechanical dumpers.

In this case, respondent was performing a task more essential to the loading process than the plaintiffs' jobs in *Schwalb* and *Goode*. While the railroad employees in those cases were involved in the repair, maintenance and cleaning of the "mechanical dumper," respondent was responsible for *operating* a critical component of the loading equipment itself—railroad cars that serve as the coal cargo containers to be lifted and emptied by the mechanical Dumper.

Emphasizing this Court's "consistent view" that the 1972 Amendments were "to be liberally construed" to "cover[ ] all those on the situs involved in the essential or integral elements of the loading and unloading process," this Court stated in *Schwalb* that §902(3) establishes an "occupational test focusing on loading and unloading." 493 U.S. at 46. Thus, a unanimous Court stated:

> [W]e are quite sure that employees who are injured while maintaining or repairing equipment essential to the loading or unloading process are covered by the Act. Such employees are engaged in activity that is an integral part of and essential to those overall processes. That is all that §902(3) requires. Coverage is not limited to employees who are denominated "longshoreman" or who physically handle the cargo. Nor are maintenance employees removed from coverage if they also have duties not integrally connected to the loading or unloading functions. Someone who repairs or maintains a piece of loading equipment is just as vital to and an

> integral part of the loading process *as the operator of the equipment.* When machinery breaks down or becomes caught or fouled because of the lack of cleaning, the loading process stops until the difficulty is cured. It is irrelevant that an employee's contribution to the loading process is not continuous or that repair or maintenance is not always needed. *Employees are surely covered when they are injured while performing a task integral to loading a ship.*

493 U.S. at 47 (emphasis added).

Respondent's activities present an even stronger case for satisfying the occupational status test than the railroad maintenance workers in *Schwalb* and *Goode.* Respondent was directly involved in operating an integral part of the loading equipment—coal-filled railroad cars that are picked up as a unit by the mechanical Dumper, their contents emptied into the coal hopper and via conveyor belts, directly into the ship's hold. Respondent's activities (and those of the "switchyard crew") included not only moving each individual car to the Dumper, but also "lock[ing] the coal-filled cars into" the Dumper. 985 F.2d at 293.

In addition, it was Stowers' job to separate empty cars in the backtrack area damaged by the mechanical dumper that were in need of repair. Stowers was injured while performing this later task.

If railroad employees who maintain a component part of the loading equipment are as "vital to and an integral part of the loading process *as the operator of the equipment*" under *Schwalb,* 493 U.S. at 47, then a yard engineer who *operates* a component part of the loading equipment is indisputably covered by the Act. The Sixth Circuit's determination to the contrary flies in the face of this Court's holding in *Schwalb.*

B. The Sixth Circuit's Decision Is Premised On An Analytical Framework That Has Been Expressly Rejected In *Schwalb, P.C. Pfeiffer,* And *Caputo.*

The Sixth Circuit's decision placed express reliance upon the holding and analytical framework set forth by the Fourth Circuit Court of Appeals in *Conti v. Norfolk & Western Railway Co.*, 566 F.2d 890 (1977). Yet *Conti* was decided only 6 months after this Court's decision in *Caputo*. *Conti's* continued precedential value in the wake of this Court's subsequent decisions in *P.C. Pfeiffer* and *Schwalb* is untenable. *See, Harmon v. Baltimore & Ohio Railroad Co.*, 741 F.2d 1398 (D.C. 1984).

The facts in *Conti* are in some respects similar to this case. It is unclear whether the brakemen in *Conti* were, like the respondent here, responsible for pushing each individual coal-filled car directly into the mechanical dumper and then "lock[ing] the coal-filled cars into [the] mechanical 'dumpers.' " 985 F.2d at 293 (App. A2). *Conti* held that the brakemen did not meet the "status" requirement because their job was not "of a traditional maritime nature." The *Conti* court stated:

> To us the nub of the Court's decision [in *Caputo*] is that an employee who is not engaged in "an integral part of the unloading process" will not fall within the coverage of the act *unless his occupation is of a traditional maritime nature.* *****
>
> It is clear that in the cases before us, the occupations of the plaintiff's were not of a traditionally maritime nature, but on the contrary were those traditionally associated with railroading. Their tasks and responsibilities with respect to the unloading of the coal from the hoppers would have been the same at an inland terminal as they were at Lambert's Point, and the sophisticated automation of the facilities at the latter terminal should not

> obscure the basis of the fact that the plaintiff's were engaged in unloading a coal train, not loading a vessel.

566 F.2d at 895 (emphasis added).

Likewise, the Sixth Circuit emphasized:

> Stowers' duties stopped at the dock and did not involve loading or unloading a vessel.***** [W]e believe that the LHWCA as interpreted by the Supreme Court, requires us to focus, as the *Conti* court did, on the nature of the plaintiff's occupation; in so doing, we are led to conclude that there is a meaningful distinction between loading or unloading ships and loading or unloading cars.

985 F.2d at 296 (App. A9).

But this "meaningful distinction" is an artificial and illusory construct. Where the railroad cars are themselves the cargo containers, the movement of those containers into the mechanical Dumper, locking them in place and removing them from the mechanical dumper after the cars have been lifted and emptied, is *both* the unloading of the cars *and* the loading of a vessel. The cars are as much a component of the unloading/loading process as the mechanical Dumper itself.

The Sixth Circuit's analysis is premised on the argument that respondent's job responsibilities were "typical railroad functions" or "traditional railroad tasks" which "were the same as they would have been at any other railroad switchyard servicing another type of industry . . ." 985 F.2d at 295, 297 (App. A8-A9). In the majority's view, respondent was not performing "traditional maritime tasks." *id.* at 295.

But this analytical framework ignores the teachings of *Caputo* and *P.C. Pfeiffer* that the 1972 Amendments were intended "to cover those longshoring operations

that modern technology had moved onto the land." The 1972 Amendments "extended the coverage shoreward." *Caputo*, 432 U.S. at 263, 276. For instance, this Court noted in *P.C. Pfeiffer* that although

> frontmen *who attach the cargo to the lifting devices* need not board a ship to carry out their duties, *they are incontestably longshoremen directly engaged in the loading process.*

444 U.S. at 81 (emphasis added). Similarly, a "warehouseman" in *P.C. Pfeiffer* responsible for fastening already off-loaded military vehicles from the dock onto railroad flatcars, was engaged in "maritime employment" because he was part of the overall process of "moving cargo directly from ship to land transportation . . ." 444 U.S. at 82.

So too is respondent who, like the "frontman" in *P.C. Pfeiffer*, is responsible for moving and "lock[ing] the coal-filled cars into" the Dumper "lifting device." 985 F.2d at 293 (App. A2). The vagaries of union jurisdiction and whether a particular employee may be described as performing "traditional railroad" or "traditional maritime" work are irrelevant under this Court's decisions. As stated in *Schwalb*:

> It makes no difference that the particular kind of repair Goode was doing might be considered traditional railroad work or might be done by railroad employees wherever railroad cars are unloaded. The determinative consideration is that the ship loading process could not continue unless the retarder that Goode worked on was operating properly. It is notable that the loading actually was stopped while Goode made the repairs and that one of his supervisors apparently expressed the desire that Goode hurry up so that the loading could continue.

493 U.S. at 48.

In this case, respondent admitted on deposition that performing his job was "essential" to the continued loading of the ship which would cease were he not to perform his immediate responsibilities.

C. The Sixth Circuit Holding Resurrects The "Point Of Rest" Doctrine Rejected In *Caputo*.

The Sixth Circuit ruling emphasized that respondent's duties "stopped at the dock and did not involve loading or unloading a vessel." 985 F.2d at 296 (App. A2). This analysis resurrects the "point of rest" doctrine rejected in *Caputo*. The point of *Caputo*, as well as the subsequent cases of *P.C. Pfeiffer* and *Schwalb*, is that, with the advent of modern cargo handling technologies, loading operations occur not only *at* the dock, but *before* reaching the dock where cargo containers are readied for loading. Traditional stevedore or longshore gang activities are not limited to the first "point of rest" outside the ship's hold either before loading or after unloading. *Caputo* rejected the "point of rest" doctrine for many activities that would otherwise "stop at the dock" because it

> . . . fail[s] to give effect to the obvious [legislative] desire to cover longshoremen whether or not their particular task at the moment of injury is clearly a "longshoring operation." The theory does not comport with the Act's focus on occupations and its desire for uniformity.

432 U.S. at 276.

Hence, it is wholly irrelevant that respondent's activities as a Yard Engineer, operating a locomotive pushing coal cars into the mechanical Dumper for loading, as a technical description may have "stopped at the dock." In *P.C. Pfeiffer*, both employees' work "stopped at the dock" and did not involve the direct

"loading or unloading of a vessel."[8] Nevertheless, both were held to be covered by the Act because they were "engaged in *intermediate steps of moving cargo* between ship and land transportation." 444 U.S. at 82-83. Under *P.C. Pfeiffer* all that is required is that the employee be

> . . . responsible for some portion of that activity [that] is as much *an integral part of* the process of loading or unloading a ship as a person who participates in the entire process.

444 U.S. at 82-83 (emphasis added).

By focusing on the dockside "situs" of the yard engineer's responsibilities, the Sixth Circuit has impermissibly narrowed the scope of covered employees to the first "point of rest" before the immediate act of loading—even if the employee's dockside activities are "an integral part of" the overall process of loading or unloading a ship.

D. The Sixth Circuit's Holding Is Contrary To The Broad Remedial Purposes Of The 1972 Amendments Of The Act Which Were Intended To Include Many Land-Based Activities At A Covered Situs.

The Sixth Circuit's holding is an unduly narrow application of the 1972 Amendments which, under *Caputo*, were intended to receive a "broad" and "expansive view of the intended coverage". 432 U.S. at 268. As stated in *Harmon, supra*, the 1972 Amendments "substantially extended LHWCA's reach shoreward." 741 F.2d at 1401. "Congress intended to apply a simple, uniform, standard of coverage." *P.C. Pfeiffer*, 444 U.S. at 83.

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[8] Plaintiff Ford was fastening already off-loaded vehicles onto a railroad flat car. Plaintiff Bryant was injured while removing already off-loaded cotton bales from a drey wagon into a pier warehouse. *P.C. Pfeiffer*, 444 U.S. at 71-72.

The Sixth Circuit opinion pays lip service to the expansive sweep of the 1972 Amendments, but, in fact, reads the 1972 Amendments narrowly and ignores the "primary motivation" for the congressional decision to "extend the coverage shoreward." With the advent of modern cargo-handling techniques, "much of the longshoreman's work off the vessel [had moved] onto land." *Caputo,* 432 U.S. at 269-70. The Sixth Circuit's and Fourth Circuit's attempted distinction between the "unloading of a coal train" and the "loading of a vessel," 985 F.2d at 296 (App. A8-A9), fails to "serve[ ] the broader congressional purpose of expanding coverage." *P.C. Pfeiffer,* 444 U.S. at 83. Indeed, the Sixth Circuit wholly misreads that congressional purpose by quoting with approval the observation of the First Circuit Court of Appeals that Congress

> "did not see itself as including under the Act whole new groups and classes of employees. Coverage was still to be geared only to persons who loaded and unloaded vessels (or else repaired or built them) and who fit such traditional maritime designations as longshoreman, harborworker, and the like."

985 F.2d at 296 (App. A10), quoting from *Stockman v. John T. Clark Son of Boston, Inc.,* 539 F.2d 264 at 276 (1st Cir. 1976), *cert. denied,* 433 U.S. 908 (1977).

The First Circuit's decision in *Stockman* was rendered in 1976, nearly one year *before* this Court's seminal decision construing the 1972 Amendments in *Caputo.* Such a narrow reading of congressional purpose does not comport with this Court's determination that the definition of "maritime employment" should receive, on balance, an expansive application:

> The language of the 1972 Amendments is broad and suggests that we should take an expansive view of the extended coverage. Indeed such a construction

> is appropriate for this remedial legislation. The Act "must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results." *Voris v. Eikel*, 346 U.S. 328, 333 (1953).

Caputo, 432 U.S. at 268.

The Sixth Circuit's pinched reading of the 1972 Amendments and this Court's past decisions giving broad sweep to the meaning of the term "maritime employment" frustrates the Congressional purpose "to expand coverage under the LHWCA so as to eliminate many of the pointless distinctions and dilemmas created by the *Jensen* case and its progeny." *Harmon, supra*, 471 F.2d at 1403. The Sixth Circuit judgment substantially fails that purpose and denies the remedial benefits of the Act to many railroad employees now working at marine railway facilities across this country.

E. The Sixth Circuit's Holding Presents A Conflict With Other Circuit Courts Of Appeal And With A State Court Of Last Resort.

There is significant division among the federal circuit courts and at least one state supreme court on the issue of coverage under the LHWCA which makes it imperative for this Court to accept this case and decide the issue.

In *Harmon v. Baltimore & Ohio Railroad Co.*, 741 F.2d 1398 (D.C. 1984), the court expressly rejected the "simple distinction" between "traditional railroading tasks" and "traditional maritime tasks" since that distinction "smacks too much of the rigidity that the 1972 Amendments sought to eliminate from the coverage mechanisms of LHWCA." 741 F.2d at 1404. Here, the

Sixth Circuit frankly noted that the D.C. Circuit in *Harmon* had "rejected the distinction between loading ships and unloading railcars . . ." *Id.* at 296 (App. A9).

The plaintiff in *Harmon* was injured while repairing a hopper through which coal passed moving from railroad cars to the ships. Plaintiff contended that his duties "should be characterized as essential to the single railroad task of unloading railroad cars and, accordingly, should be outside the scope of LHWCA." 741 F.2d at 1401. Rejecting that distinction, the D.C. Circuit stated:

> The distinction between loading ships—clearly within the ambit of the LHWCA—and unloading railroad cars is, as the District Court pithily observed: "purely semantic." The coverage under LHWCA cannot turn on such gossamer strands.

741 F.2d at 1401. Thus, the District of Columbia and the Sixth and Fourth Circuit Courts of Appeal (to the extent *Conti* is viewed as maintaining a veneer of continued validity) are in conflict on this issue.

In *Patterson v. CSX Transportation, Inc.*, No. 921044, 1993 Va. LEXIS 62 (Virginia Supreme Court, April 16, 1993), the Supreme Court of Virginia found that a railroad employee was covered under the LHWCA where he was switching cars onto the "boat track spur." He was injured while uncoupling a group of four loaded railcars. This employee's duties stopped well short of the dock. The Virginia Supreme Court held:

> We hold that *Schwalb* is determinative of the "status" issue presented here. Patterson's activity at the time of his injury constituted the inception of the loading process. As the trial court found, Patterson was injured while attempting to uncouple railway cars in order to move the containers they

> carried to the boat track. Upon their transfer to the boat track, the cars would move down the track, without interruption, onto the barge. Since the loading process could not be completed without Patterson's work activity, we hold that his activity was essential and integral to that process.

Patterson, supra, App. A41-A42. The Sixth Circuit refused to find that respondent met the occupational test when, as in *Patterson,* the ship loading process could not continue without respondent performing his job.

The Sixth Circuit's refusal to extend the Act's coverage to a "traditional railroad" job at a covered situs brings the Sixth Circuit into conflict with a number of other federal court decisions. *See Pennsylvania Railroad Co. v. O'Rourke,* 344 U.S. 334 (1952) (plaintiff employed as brakeman, found to be covered by LHWCA); *Hayes v. CSX Transportation, Inc.,* 985 F.2d 137 (4th Cir., January 22, 1993) (railroad "carman" working on flatbed car held covered by the Act); *Vogelsang v. Western Maryland Railway Co.,* 670 F.2d 1347 (4th Cir. 1982) (signalman stationed on top of railcar to open and close lids and to signal engineer to move cars, found to be covered by LHWCA); *Conligio v. Norfolk & Western Ry. Co.,* 670 F. Supp. 1353 (E.D. Mich. 1987) (locomotive engineer injured while loading cars into barge, found to be covered by LHWCA); *Merril v. Chicago Illinois Midland Railway Co.,* 751 F. Supp. 770 (C.D. Ill. 1990) (mechanic injured while rerailing a train found to be covered by LHWCA); *John K. Sixbey v. Norfolk & Western Ry. Co.,* unreported, C.A. No. 87-CV-60145-AA, 1988 U.S. Dist. LEXIS 17986, United States District Court, Eastern District of Michigan, Southern Division (April 4, 1988) (conductor fell while boarding railroad car, covered under LHWCA) (App. A45); *Elmer R. Richards v. Norfolk & Western Ry. Co.,*

et al., unreported, No. 86-CV-74028-DT, 1987 U.S. Dist. LEXIS 15674, United States District Court for the Eastern District of Michigan, Southern Division (October 30, 1987) (engineer moving train in railroad yard covered under LHWCA) (App. A52).

Based on the above conflicts, this Court should definitively decide the issue of whether one who is engaged in performing an occupational task that is an integral part of a process of loading a vessel at dockside is covered under the LHWCA, even when the activity involved can be described as "traditional railroad" work when performed on a marine railway situs.

CONCLUSION

The Sixth Circuit's judgment uses an illusory distinction between "unloading a railcar" and "loading a vessel" to resurrect the discarded "point of rest" doctrine and to frustrate the well settled rule that the Act's 1972 Amendments were to receive a broad and liberal application in favor of coverage.

Not only is the Sixth Circuit's judgment flatly inconsistent with the holdings and reasoning of this Court's established precedent, it also establishes a conflict with substantial lower circuit court, district court, and State Supreme Court precedent.

For all of these reasons, petitioner respectfully requests that this Court grant the Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX

DECISION OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Decided and Filed February 8, 1993)

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

No. 92-3177

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

GEORGE R. STOWERS,
Plaintiff-Appellant,

v.

CONSOLIDATED RAIL CORPORATION,
Defendant-Appellee.

ON APPEAL from the United States District Court for the Northern District of Ohio

Decided and Filed February 8, 1993

Before: JONES and RYAN, Circuit Judges; and BROWN, Senior Circuit Judge.

RYAN, Circuit Judge, delivered the opinion of the court, in which JONES, Circuit Judge, joined. BROWN, Senior Circuit Judge (pp. 13-15), delivered a separate dissenting opinion.

RYAN, Circuit Judge. Plaintiff George R. Stowers appeals the district court's grant of summary judgment for defendant Consolidated Rail (ConRail) in this negligence action brought under the Federal Employers Liability Act (FELA), 45 U.S.C. §§ 51 *et seq.* The district court ordered summary judgment on the ground that the action

is not within the district court's subject matter jurisdiction because Stowers's exclusive remedy against his employer is under the Longshore and Harbor Workers Compensation Act (LHWCA), 33 U.S.C. §§ 901 *et seq.*

The issues on appeal are whether Stowers was a "maritime employee" within the meaning of the LHWCA; whether the area where plaintiff was injured is a "covered situs" under the LHWCA; and whether ConRail is a "maritime employer" under the LHWCA. We conclude that Stowers was not an employee engaged in "maritime employment" as defined by the LHWCA, and that he has no cause of action, therefore, under the LHWCA. Accordingly, we shall reverse the decision of the district court and remand with instructions to permit the plaintiff to proceed pursuant to the FELA.

I.

George Stowers began working as an engineer and fireman for ConRail in 1950. In 1989, he was transferred to ConRail's Ashtabula Harbor Yard in Ashtabula, Ohio, to work as a locomotive engineer for a ConRail switching crew. Harbor Yard is a railroad switching yard that services two loading dock companies, Conrail Coal Dock Company and Penney Dock Company. ConRail owns the yard, the switching facilities, and the ConRail Coal Dock Company.

During the period in question, railroad cars filled with coal were brought to the yard via the railroad. Once the coal-filled cars reached the yard, Stowers, as the locomotive engineer of the switchyard crew, reassembled the cars to make up new trains that he then pulled to the docks. At the dock, Stowers would lock the coal-filled cars into mechanical "dumpers," and ConRail Coal Dock employees would operate the dumpers to dump coal onto the conveyor belts that carried the coal directly to the ships. Stowers would then pull the empty cars back to the yard. In addition, when incoming ships loaded with iron ore arrived, Stowers would bring a train of empty cars to

the dock where Penney Dock employees would fill the rail cars with iron ore. Stowers, or members of his crew, would then haul the loaded cars back to the yard. All of the loading equipment was operated and maintained by coal dock employees. Stowers's only contact with the loading equipment was to position rail cars in the dumpers and to haul them away.

Stowers also worked on the yard's "back track," an area of the yard used for train classification and separating railroad cars in need of repair. On March 21, 1991, while working in the back track area, Stowers was injured when his locomotive rode over a portable derailer while he was separating rail cars in need of repairs.

Stowers filed suit against his employer ConRail under the Federal Employers Liability Act, 45 U.S.C. §§ 51 *et seq.*, to recover for his work-related injuries. ConRail moved for summary judgment on the basis that the district court lacked subject matter jurisdiction over the dispute because Stowers's exclusive remedy was under the Longshore Harbor Workers Compensation Act, 33 U.S.C. §§ 901 *et seq.* The district court found that although Stowers was a railroad employee, he was engaged in "maritime employment," as defined under the LHWCA, because he was an "integral and essential" part of the loading and unloading of the vessels. The district court also found that the harbor yard, including the back track, was a "maritime situs" under the LHWCA. Consequently, the court ruled that Stowers's cause of action arose under the LHWCA, which provided his exclusive remedy. The court granted summary judgment for ConRail, and Stowers filed this timely appeal.

II.

We review the district court's grant of summary judgment *de novo*. *EEOC v. University of Detroit*, 904 F.2d 331, 334 (6th Cir. 1990).

The LHWCA provides the exclusive remedy for an employee who is subject to the Act's provisions and who is injured on the job. 33 U.S.C. § 905(a). LHWCA claims must be brought through an administrative procedure, with appeals heard by administrative law judges. 33 U.S.C. § 919 *et. seq.* Federal district courts have jurisdiction to enforce the ALJ orders but lack jurisdiction to adjudicate initial LHWCA claims. 33 U.S.C. § 921(d).

The LHWCA extends coverage to all employees, including railroad employees, if the following four elements are met:

> 1) the injured person must be injured in the course of his employment, 33 U.S.C. § 902(2);
>
> 2) his employer must have employees who are employed in maritime employment, § 902(4);
>
> 3) the injury must occur "upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)," § 903(a); and
>
> 4) the employee who is injured within that area must be engaged in maritime employment, § 902(3).

Chesapeake & Ohio R.R. Co. v. Schwalb, 493 U.S. 40, 45 (1989). The Supreme Court has required that these elements be "liberally construed" so that coverage under the LHWCA is extended to all workers on the maritime situs who are involved in the "essential or integral elements of the loading and unloading of the vessels." *Id.* at 46.

The parties do not dispute that Stowers's injury occurred in the course of his employment. However, they dispute whether Stowers was engaged in "maritime employment"; whether Conrail was an "employer" as defined by the LHWCA; and whether the area where Stowers was injured was a "situs" covered by the LHWCA.

The LHWCA defines an "employee" as:

> any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker . . . .

33 U.S.C. § 902(3). Because Congress did not expressly define "maritime employment," the Supreme Court has looked to the legislative history of the LHWCA to assist in determining whether an employee falls under the Act's provisions. *See Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 257-65 (1977). Prior to 1972, the LHWCA covered only those classes of longshoreman and other maritime employees who were injured while on or over the navigable waters of the United States. This resulted in the anomalous situation whereby "amphibious" workers, that is workers who performed some duties on maritime vessels and some on dry land, found themselves "walk[ing] in and out of [LHWCA] coverage," *P.C. Pfeiffer v. Ford*, 444 U.S. 69, 76 (1979), depending on where they were working at the time of the injury. Moreover, advances in loading and unloading technologies, such as the conveyor systems used to load maritime cargo directly on or off vessels from or to land-based locations, meant that much of the traditional longshoring work that the LHWCA was intended to cover was moved inland. Thus, certain longshore workers might never set foot onto a ship or, as a result, "into coverage." To remedy these anomalies and to assure that maritime workers received the protection of the LHWCA regardless of where their work-related injuries occurred,

Congress amended the statute in 1972. In so doing, Congress broadened the covered situs by extending coverage inland. However, in an apparent trade-off, it reduced the scope of covered occupations to those employees who worked for "maritime employers" and who were injured on a covered situs while engaging in "maritime employment." *Schwalb*, 493 U.S. at 46.

The Supreme Court reacted to the 1972 amendments, by holding, as we have said, that the act is to be "liberally construed and that the LHWCA, as amended, cover[s] all those on the situs involved in the essential or integral elements of the loading or unloading process." *Id.* (citing *Caputo*, 432 U.S. at 267). Thus, the definition of "maritime employment" reaches not only traditional longshoreman-type work, but it also reaches railroad workers who engage in tasks traditionally performed by longshoremen. Applying the test liberally, the Supreme Court has held that workers performing even one integral part of the loading or unloading process are covered by the LHWCA. *P.C. Pfeiffer*, 444 U.S. at 82. The Supreme Court also held, in *Schwalb*, that railroad employees who are injured while maintaining or repairing equipment that is essential to the loading or unloading process are also covered by the LHWCA. *Schwalb*, 493 U.S. at 47; *see also Kelly v. Pittsburgh & Conneaut Dock Co.*, 900 F.2d 89 (6th Cir. 1990).

ConRail characterizes Stowers's duties as part of the overall loading and unloading of maritime vessels. According to ConRail, the process for loading the ships begins when the yard crew takes over the railroad cars from the ground crew, while the loading process ends when the yard crew leaves the empty cars with the road engineer. ConRail argues that, without the switchyard crew, the loading and unloading of ships would cease; therefore, the crew's duties play an "integral and essential part" in the loading process and constitute maritime employment. Stowers, in contrast, argues that the ConRail yard crew members perform typical railroad functions that they would perform at any switchyard

facility, and he characterizes the yard crew's duties as part of the land transportation process rather than as part of the ship-loading process.

Stowers relies primarily on *Conti v. Norfolk & W. Ry. Co.*, 566 F.2d 890 (4th Cir. 1977), a case involving facts similar to ours, in which the Fourth Circuit found that the plaintiff was not a maritime employee. In *Conti*, the yard crew was responsible for bringing railroad cars full of coal to the mechanical dumpers. These dumpers dumped the coal onto a conveyor belt that led to the ship loaders. The yard crews also took the empty cars out of the dumping area and reassembled them into trains for the return trip. The Fourth Circuit found that the yard crew employees were not engaged in the "integral part of the unloading" process and thus did not fall within the coverage of the LHWCA. The court stated:

> It is clear that . . . *the occupations of the plaintiffs were not of a traditionally maritime nature*, but on the contrary were those traditionally associated with railroading. Their tasks and responsibilities with respect to the unloading of the coal from the hopper cars would have been the same at an inland terminal as they were at Lamberts Point, and *the sophisticated automation of the facilities at the latter terminal should not obscure the basic fact that the plaintiffs were engaged in unloading a coal train, not loading a vessel.* We find nothing in the Amendments or the legislative history to indicate that under these circumstances the Congress intended to transfer the redress of such injured railroad workers from the FELA to the Longshoremen's Act.

Conti, 566 F.2d at 895 (emphasis added). Similarly, Stowers argues, the switchyard crew at Harbor Yard performs the same function it would have performed at any other industrial switching facility. Stowers points out that, at each switching facility, "the switching operation is the first or final stage in the overland transportation, and not an adjunct of the loading or unloading by the recipient

of the cargo." Therefore, according to Stowers, the switchyard crew members fit the Supreme Court's example of workers "whose dockside duties do not fall within the ambit of the LHWCA."[1]

Conceding that *Conti* has never been overruled, ConRail argues that the basis of the *Conti* decision is contrary to the Supreme Court's more recent guidance in *Schwalb*, which rejects the distinction between traditional railroad tasks and traditional maritime tasks as the sole test for determining LHWCA coverage. *Schwalb*, 493 U.S. at 48. The *Schwalb* Court stated:

> It makes no difference that the particular kind of repair [plaintiff] was doing might be considered traditional railroad work or might be done by railroad employees wherever railroad cars are unloaded. The determinative consideration is that the ship loading process could not continue unless the [equipment] that [plaintiff] worked on was operating properly.

Id. Similarly, ConRail argues, it does not matter whether the work performed by Stowers is considered traditional railroad work. If Stowers's duties were an essential part of the ship-loading process and if the ship loading or unloading process could not continue without Stowers, then he is considered a maritime employee under the LHWCA.

We disagree. The *Conti* court refused to extend coverage of the LHWCA to the plaintiffs because it found that the plaintiffs were not engaged in work "traditionally maritime" and were, instead, "engaged in the unloading of a coal train, not loading a vessel." *Conti*, 566 F.2d at

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[1] For example, in *Caputo*, the Supreme Court stated:

> [E]mployees such as truckdrivers, whose responsibility on the waterfront is essentially to pick up or deliver cargo unloaded from or destined for maritime transportation are not covered.

895. Like the plaintiffs in *Conti*, Stowers's duties stopped at the dock and did not involve loading or unloading a vessel. Although the D.C. Circuit has rejected the distinction between loading ships and unloading rail cars,[2] we believe that the LHWCA, as interpreted by the Supreme Court, requires us to focus, as the *Conti* court did, on the nature of the plaintiff's occupation; in so doing, we are led to conclude that there is a meaningful distinction between loading or unloading ships and loading or unloading rail cars.

This approach is consistent with our finding of "maritime employment" in *Warren Bros. v. Nelson*, 635 F.2d 552 (6th Cir. 1980), where we held that the plaintiff's work in trucking gravel from shipside to a nearby storage pile adjacent to his employer's factory was an integral part of the "overall process" of unloading the barges. In that case, gravel was unloaded from the barges into a shipside hopper. We found that the movement from barge to hopper was the first step of the vessel-loading process and that the unloading required a second step, from hopper to stockpile via truck. "The two steps form a unified [unloading] process." *Id.* at 555. In contrast, the loading (or unloading) of the ships at Ashtabula Yard began (or ended) with the rail cars at the dumpers.

Moreover, it is significant here, that Stowers did not participate in the loading or unloading of the rail cars; he merely delivered the cars to the loading and unloading site, and later hauled them away.

We reject ConRail's argument that we should extend LHWCA coverage in this case simply because the

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432 U.S. at 267.

2 "The distinction between loading ships--clearly within the ambit of the LHWCA--and unloading railroad cars is . . . 'purely semantic.' The coverage under LHWCA cannot turn on such gossamer strands." *Harmon v. Baltimore & O. R.R.*, 741 F.2d 1398, 1401 (D.C. Cir. 1984).

Supreme Court has favored a liberal application of the LHWCA provisions. We agree with the Third Circuit, which stated:

> The line which Congress intended to draw was between maritime commerce and land commerce, and the coverage of the [LHWCA] starts at the point where the cargo passes to or from an employer engaged in the former to an employer engaged in the latter . . . .

Sea-Land Serv., Inc. v. Director, Office of Workers' Compensation Programs, etc., 540 F.2d 629, 639 (3d Cir. 1976). Even though the Supreme Court has called for a liberal interpretation of what constitutes "maritime employment," the Court has not extended coverage to all workers located on the "maritime" situs. It has limited coverage only to workers whose duties involve an "essential and integral part" of the loading process. *Schwalb*, 493 U.S. at 46. When it amended the LHWCA, Congress

> did not see itself as including under the Act whole new groups and classes of employees. Coverage was still to be geared only to persons who loaded and unloaded vessels (or else repaired or built them) and who fit such traditional maritime designations as longshoreman, harborworker, and the like.

Stockman v. John T. Clark Son of Boston, Inc., 539 F.2d 264, 276 (1st Cir. 1976), *cert. denied*, 433 U.S. 908 (1977). Thus, to apply the "integral relation" test of "maritime employment" in an excessively broad way that would necessarily encompass any and all workers on the situs, directly conflicts with Congressional intent as stated in the Congressional history and as interpreted by the Supreme Court.

The Supreme Court has expressly recognized that the concept of "maritime employment" on the covered situs

requires that a line be drawn between those workers whose duties are justly described as "maritime" in nature, and those whose duties relate to overland transportation. The Court has refused to extend coverage to all workers present at the situs, stating that it is clear Congress wanted to cover "persons whose employment is such that they spend at least some of their time in indisputably longshoring operations and who, without the 1972 Amendments, would be covered for only part of their activity." *Caputo*, 432 U.S. at 273. "[P]ersons who are on the situs but are not engaged in the overall process of loading and unloading vessels are not covered." *Id.* at 267.

Not surprisingly, we have found no case in which a court has found that a railroad worker (or, as in this instance, a locomotive engineer) whose duties involved railroad classification in a railroad yard is held to be a maritime worker under the LHWCA. As the unique facts of each case are presented, the line must be drawn somewhere. We find that common sense dictates that, on the facts of this case, it be drawn where one form of transportation ceases and the other begins. The switchyard crew's duties were part of the first or last stage of the overland railroad shipment of cargo. The crew's duties were the same as they would have been at any other railroad switchyard servicing another type of industry in which railroad cars are loaded and unloaded by another trade, employer, or business entity. Stowers did not participate in the loading or unloading of the ships, or even of the rail cars, and therefore he certainly was not engaged in an "essential or integral" part of the shiploading process. He hauled the rail cars to the docks for dock employees to load or unload, and he hauled them away when dock employees were finished loading or unloading them. The overland transportation began and ended with the work of Stowers and the switchyard crew. We find that Stowers was not engaged in "maritime employment" for purposes of the LHWCA.

We need not address, therefore, the question whether Stowers was injured at a "maritime situs" or employed by a "maritime employer."

III.

We **REVERSE** the district court's grant of summary judgment in favor of ConRail and **REMAND** for further proceedings pursuant to the FELA.

BAILEY BROWN, Senior Circuit Judge, dissenting. Because I disagree with the majority's conclusion that Stowers was not engaged in "maritime employment" for purposes of the LHWCA, I respectfully dissent.

In essence, the majority opinion reaches the conclusion that Stowers' claim must be under the FELA and not under the LHWCA because, following the Fourth Circuit's holding in *Conti v. Norfolk & Western Ry.*, 566 F.2d 890 (4th Cir. 1977), Stowers' work was not "traditionally maritime" and instead was "unloading of a coal train, not loading a vessel." Slip op. at 8. The majority opinion correctly recognizes that the more recent opinion of the District of Columbia Circuit in *Harmon v. Baltimore & Ohio R.R.*, 741 F.2d 1398 (D.C. Cir. 1984), squarely supports the decision of the district court in the instant case and expressly disagrees with the holding of the Fourth Circuit in *Conti*.

It is undisputed that the Harbor Yard's role was to receive cars loaded with coal from the mines (in an area of the Harbor Yard called the "Bridge Yard") brought in by railroad over-the-road crews. The loaded cars were then moved by a Harbor Yard locomotive operated by a yard engineer such as Stowers, and were spotted by the engineer in a dumper located on the coal dock bordering the Ashtabula River. These loaded cars were then lifted and dumped by the dock crew and the coal was moved into the ship by a conveyor belt. After the cars were emptied and placed back on the track, the yard engineer would then move them to another part of the Harbor Yard (the "back track") where the damaged cars were "bad ordered" and the non-damaged cars were made into a train which over-the-road crews would take away.[1] Stowers was injured when his engine derailed while moving empty coal cars from the dock area to the "back track" in Harbor

[1]It appears that the Harbor Yard also serviced a dock on the river where ore was unloaded into empty cars which were moved by yard engineers from the dock into the Harbor Yard where they were picked up by over-the-road crews.

Yard where damaged cars were to be "bad ordered" and the remainder placed to be picked up by an over-the-road crew.

I believe that Stowers' injury is covered by the LHWCA because his work was "essential to the loading or unloading process. . . ," *Chesapeake & Ohio R. R. v. Schwalb*, 433 U.S. 40, 47 (1989), and the injury occurred on a maritime situs. Certainly Stowers would have been covered by the LHWCA if he had been injured while spotting a full coal car in the dumper or while removing an empty car from the dumper because he would then have been a part of the loading crew. If Stowers was covered when actually participating in the loading process, he would also be covered while moving empty cars in Harbor Yard away from the loading process because a primary purpose of the 1972 amendments was to do away with the phenomenon of employees who, in performing their duties, moved in and out of coverage under the LHWCA. *P. C. Pfeiffer Company v. Ford*, 444 U.S. 69, 75-76 (1979).

Accordingly, it is clear that Stowers was a "maritime employee" within the meaning of the LHWCA. This is all the more certain when one recognizes, as does the majority opinion, citing *Schwalb*, 493 U.S. at 46, that the legislative history of the 1972 amendments shows that Congress intended the LHWCA to be liberally construed in favor of coverage.

While the majority opinion does not deal with Stowers' contention that his injury does not satisfy the "situs" requirement of the LHWCA because he was injured on the "back track" in Harbor Yard, it is clear that this part of Harbor Yard was part of the situs since the act defines situs to include a "marine railway." 33 U.S.C. § 902(4) (1988). Certainly, Harbor Yard, adjoining and serving only those docks on Ashtabula River, is a "marine railway."

While the majority opinion states that it is consistent with the opinion of this court in *Warren Bros. v. Nelson*, 635 F.2d 552 (6th Cir. 1980), I disagree. Indeed, *Warren Bros.* actually supports my position. In *Warren Bros.*, the employee, a truck driver, was injured while moving gravel, which had been unloaded from barges into a hopper on a floating platform, to a nearby plant. The gravel had been unloaded from the barge and had then been picked up by the truck driver after which he suffered his injury. This court held that the truck driver was covered by the LHWCA.

I understand the majority opinion to agree that if Stowers were a "maritime employee," Conrail would be his "maritime employer." Since, in my opinion, he was a "maritime employee," Conrail was a "maritime employer."

I would therefore affirm the decision of the district court which held that Stowers' exclusive remedy is under the LHWCA.

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT

(Filed February 4, 1992)

Case No. 1:91CV1022

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

GEORGE R. STOWERS,
Plaintiff,

vs.

CONSOLIDATED RAIL CORPORATION,
Defendant.

MEMORANDUM AND ORDER

ALDRICH, *J.*

George Stowers brings this action under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §51, *et seq.*, against his employer, Consolidated Rail Corporation ("Conrail"), to recover for personal injuries he sustained at the Ashtabula Harbor Yard. Conrail has moved for summary judgment on the ground that Stowers' exclusive remedy lies under the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §901, *et seq.*, a matter outside the Court's subject matter jurisdiction. Stowers has moved for partial summary judgment on the same issue. For the reasons stated, Stowers' motion is denied, Conrail's motion is granted, and this action is dismissed.

I.

The undisputed material facts are as follows. Stowers was employed by Conrail as a locomotive engineer at the Ashtabula Harbor Yard. The Ashtabula Harbor Yard ("the yard") is a railroad switch yard that services two loading docks, the Conrail Coal Dock and the Penny Dock Company. These dock facilities load coal and unload iron ore from ships. Coal is transported to the yard by rail. At the yard, locomotive engineers, like Stowers, break the trains apart and place the individual rail cars into side tracks to be transported to the loading docks. At the docks, other employees dump the coal onto ships. The engineers, then, spot the empty cars and pull them back to the yard where they can be formed into a train and taken away. Stowers never engaged in the direct loading or unloading of ships. He merely dropped off the loaded railcars at the docks for others to unload, and later picked up the empty cars.[1]

At the time of his injury, Stowers was operating a locomotive on the "back track" of the yard, where he was separating empty cars, which needed repairs, from the cars that would be transported away. Stowers was injured when he ran over a portable derailer and derailed his locomotive. He now suffers a permanent disability. Stowers filed suit under FELA to recover for his injuries. Conrail has moved for summary judgment based solely on its claim that this Court lacks subject matter jurisdiction over this dispute.

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[1] The train crews in the yard perform the same tasks for the Penny Dock, but in reverse. The yard engineers deliver empty cars to the dock to be loaded with iron ore, and then take the loaded cars away.

II.

Federal Rule of Civil Procedure 56(c) governs summary judgment motions and provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law . . .

The nature of materials properly presented in a summary judgment pleading is set forth in Federal Rule of Civil Procedure 56(e):

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein . . . The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denial of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

However, the movant is not required to file affidavits or other similar materials negating a claim on which its opponent bears the burden of proof, so long as the movant relies upon the absence of the essential element in the pleadings, depositions, answers to interrogatories, and admissions on file. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

In reviewing summary judgment motions, this Court must view the evidence in the light most favorable to the non-moving party to determine whether a genuine issue of material fact exists. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *White v. Turfway Park Racing Assn., Inc.*, 909 F.2d 941, 943-44 (6th Cir. 1990). A fact is "material" only if its resolution will affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Determination of whether a factual issue is "genuine" requires consideration of the applicable evidentiary standards. Thus, in most civil cases the Court must decide "whether reasonable jurors could find by a preponderance of the evidence that the [non-moving party] is entitled to a verdict." *Id.* at 252.

III.

For employees subject to its provisions, the LHWCA provides the exclusive remedy for injuries sustained on the job and bars claims under FELA. 33 U.S.C. §905(a); *Kelly v. Pittsburgh & Conneaut Dock Co.*, 900 F.2d 89 (6th Cir. 1990). LHWCA claims must be brought through an administrative procedure, with appeals to an administrative law judge. This Court lacks jurisdiction to hear such claims. *Connors v. Consolidated Rail Corporation*, 664 F.Supp. 982 (W.D. Pa. 1987).

In determining whether Stowers is covered by the LWHCA, the Court must examine the nature of the job he was performing (the "status test") and the nature of the place where he was injured (the "situs test"). *Triguero v. Consolidated Rail Corp.*, 932 F.2d 95, 99 (2nd Cir. 1991); *Conligio v. Norfolk and Western Rwy. Co.*, 670 F.Supp. 1353, 1354 (E.D. Mich. 1987). Both tests must be satisfied.

A. *The Status Test*

The status test is satisfed only if Stowers was "engaged in maritime employment" at the time of his injury. 33 U.S.C. §902(3); *Chesapeake and Ohio Railway Co. v. Schwalb,* 110 S.Ct. 381, 384 (1989). The definition of "maritime employment" extends beyond the actual loading and unloading of ships, traditional longshoremen-type work. The definition also reaches railroad workers "who move cargo between ship and land transportation." *P.C. Pfeiffer Co. v. Ford,* 444 U.S. 69, 83-84 (1979). So long as the worker's job "is an integral part of and essential to the overall loading process," he is covered by the LHWCA. *Schwalb,* 110 S.Ct. at 385. As the Supreme Court explained:

> It makes no difference that the particular type of [work that the employee] was doing might be considered traditional railroad work or might be done by railroad employees wherever railroad cars are unloaded. The determinative consideration is that the ship loading process could not continue unless [the employee's job was performed].

Id. at 386.

In *Congilio,* 670 F.Supp. at 1356, for example, the employee in question was a locomotive engineer who was injured while he was maneuvering railroad cars to make trains to be loaded onto barges. The plaintiff argued that "making up of trains" was "by its very nature railroad work" and sought to exclude himself from LHWCA coverage. In rejecting this argument, the Court held:

> Plaintiff draws too fine of a line between covered and excluded activity. The "making up" of railcars for water shipment has a direct and immediate relationship to the loading process. Plaintiff was directly engaged in moving cargo from land to water transportation.

Id. Accordingly, the court held that Congilio was engaged in maritime employment and covered by the LHWCA.

Similarly, Stower's job involved moving railcars to and from loading dock facilities. While he never directly loaded cargo onto ships, he nevertheless participated in the overall loading process. His primary purpose as a yard engineer was to move loaded and unloaded cars between land and water transportation. If Stowers stopped performing these tasks, the overall loading process would cease. Accordingly, this Court concludes that Stowers was engaged in maritime employment, as defined by the LHWCA.

B. *The Situs Test*

The situs test is satisfied if the injury occurred "on the navigable waters or in an ... adjoining area customarily used ... in loading or unloading ... vessels." 33 U.S.C. §905(a). Courts have generally taken a broad and expansive view of the situs requirement. *Humphries v. Director, Office of Workers Compensation Programs,* 834 F.2d 372, 375 (4th Cir. 1987) ("a broad interpretation of the maritime situs requirement is warranted on statutory and policy grounds."); *Congilio,* 670 F.Supp. at 1355 ("The situs test must be broadly interpreted, with the status test, operating to refine the parameters of the LHWCA's coverage."). To be covered by the LHWCA, an area need not directly adjoin navigable waters, so long as it is an integral part of the loading operations. *See Triguero,* 932 F.2d at 101; *Merrill v. Chicago & Illinois Midland Rwy.,* 751 F.Supp. 770, 777 (C.D. Ill. 1990).

Stowers was injured on the "back track" of the yard where he was separating empty cars that needed repairs from cars that were leaving the yard. Stowers argues that this "back track" was too far from the docks to satisfy the situs test. In *Congilio*, a locomotive engineer was injured in the "eastbound yard" on tracks that were not directly used to load the railcars onto barges. Nevertheless, the court held that the situs test was met:

> [T]he "eastbound yard" customarily and almost exclusively contains railcars destined for shipment to Canada. . . . further, the eastbound tracks connect directly with the tracks used for loading the railcars onto barges in the river.

In *Merrill*, 751 F.Supp. at 777, as well, the plaintiff was injured on railroad tracks that were outside the loading area. In that case, the injury occurred on tracks leading away from the facility where coal was dumped on conveyers for loading. "It is true," the court held, "that the tracks . . . do not themselves directly assist in the loading process, but on the other hand, without them the loading process could not proceed—the tracks are 'essential to the loading or unloading process,' and thus are within the situs." *Id.* (citing *Schwalb*).

Similarly, this Court concludes that the back track of the Ashtabula yard is an area customarily used in the overall loading process. The tracks are directly connected to other tracks used to deliver the cars to and from the loading docks. Moreover, they contain cars that have been unloaded at the docks and need to be sent out on the railways. The back track, therefore, plays an integral part in the movement of cars between water and land transportation. Accordingly, the Court concludes that the injury occurred in an area covered by the LHWCA.

IV.

In sum, the Court concludes that Stowers is an employee covered by the provisions of the LHWCA. Because this Court lacks subject matter jurisdiction over that matter, this action is dismissed.

IT IS SO ORDERED.

/s/ ANN ALDRICH
United States District Judge

ORDER OF THE UNITED STATES DISTRICT COURT

(Filed February 4, 1992)

Case No. 1:91CV1022

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

GEORGE R. STOWERS,
Plaintiff,

vs.

CONSOLIDATED RAIL CORPORATION,
Defendant.

ORDER

ALDRICH, *J.*

The Court has filed its memorandum and order denying plaintiff's motion for partial summary judgment, and granting defendant's motion for summary judgment; therefore,

IT IS ORDERED that summary judgment is granted in favor of the defendant, and the case is dismissed for lack of subject matter jurisdiction.

/s/ ANN ALDRICH
United States District Judge

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING

(Filed April 6, 1993)

No. 92-3177

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[1993 U.S. App. LEXIS 7332]

GEORGE R. STOWERS,
Plaintiff-Appellant,

v.

CONSOLIDATED RAIL CORPORATION,
A/K/A CONRAIL,
Defendant-Appellee.

BEFORE: JONES and RYAN, *Circuit Judges;* and BROWN, *Senior Circuit Judge.*

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

33 U.S.C. §901

§901. Short title

This chapter may be cited as "Longshore and Harbor Workers' Compensation Act."

33 U.S.C. §902

§902. Definitions

When used in this chapter—

(1) The term "person" means individual, partnership, corporation, or association.

(2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

(3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include—

(A) individuals employed exclusively to perform office clerical, secretarial, security, or data processing work;

(B) individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet;

(C) individuals employed by a marina and who are not engaged in construction, replacement, or expansion of such marina (except for routine maintenance);

(D) individuals who (i) are employed by suppliers, transporters, or vendors, (ii) are temporarily doing business on the premises of an employer described in paragraph (4), and (iii) are not engaged in work normally performed by employees of that employer under this chapter;

(E) aquaculture workers;

(F) individuals employed to build, repair, or dismantle any recreational vessel under sixty-five feet in length;

(G) a master or member of a crew of any vessel; or

(H) any person engaged by a master to load or unload or repair any small vessel under eighteen tons net;

if individuals described in clauses (A) through (F) are subject to coverage under a State workers' compensation law.

(4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

(5) The term "carrier" means any person or fund authorized under section 932 of this title to insure under this chapter and includes self-insurers.

(6) The term "Secretary" means the Secretary of Labor.

(7) The term "deputy commissioner" means the deputy commissioner having jurisdiction in respect of an injury or death.

(8) The term "State" includes a Territory and the District of Columbia.

(9) The term "United States" when used in a geographical sense means the several States and Territories and the District of Columbia, including the territorial waters thereof.

(10) "Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment; but such term shall mean permanent impairment, determined (to the extent covered thereby) under the guides to the evaluation of permanent impairment promulgated and modified from time to time by the American Medical Association, in the case of an individual whose claim is described in section 910(d)(2) of this title.

(11) "Death" as a basis for a right to compensation means only death resulting from an injury.

(12) "Compensation" means the money allowance payable to an employee or to his dependents as provided for in this chapter, and includes funeral benefits provided therein.

(13) The term "wages" means the money rate at which the service rendered by an employee is compensated by an employer under the contract of hiring in force at the time of the injury, including the reasonable value of any advantage which is received from the employer and included for purposes of any withholding of tax under subtitle C of the Internal Revenue Code of 1954 [26 U.S.C.A. §3101 et seq.] (relating to employment taxes). The term wages does not include fringe benefits, including (but not limited to) employer payments for or contributions to a retirement,

pension, health and welfare, life insurance, training, social security or other employee or dependent benefit plan for the employee's or dependent's benefit, or any other employee's dependent entitlement.

(14) "Child" shall include a posthumous child, a child legally adopted prior to the injury of the employee, a child in relation to whom the deceased employee stood in loco parentis for at least one year prior to the time of injury, and a stepchild or acknowledged illegitimate child dependent upon the deceased, but does not include married children unless wholly dependent on him. "Grandchild" means a child as above defined of a child as above defined. "Brother" and "sister" includes stepbrothers and stepsisters, half brothers and half sisters, and brothers and sisters by adoption, but does not include married brothers nor married sisters unless wholly dependent on the employee. "Child", "grandchild", "brother", and "sister" include only a person who is under eighteen years of age, or who, though eighteen years of age or over, is (1) wholly dependent upon the employee and incapable of self-support by reason of mental or physical disability, or (2) a student as defined in paragraph (19) of this section.

(15) The term "parent" includes step-parents and parents by adoption, parents-in-law, and any person who for more than three years prior to the death of the deceased employee stood in the place of a parent to him, if dependent on the injured employee.

(16) The terms "widow or widower" includes only the decedent's wife or husband living with or dependent for support upon him or her at the time of his or her death; or living apart for justifiable cause or by reason of his or her desertion at such time.

(17) The terms "adoption" or "adopted" mean legal adoption prior to the time of the injury.

(18) The term "student" means a person regularly pursuing a full-time course of study or training at an institution which is—

(A) a school or college or university operated or directly supported by the United States; or by any State or local government or political subdivision thereof,

(B) a school or college or university which has been accredited by a State or by a State recognized or nationally recognized accrediting agency or body,

(C) a school or college or university not so accredited but whose credits are accepted, on transfer, by not less than three institutions which are so accredited, for credit on the same basis as if transferred from an institution so accredited, or

(D) an additional type of educational or training institution as defined by the Secretary,

but not after he reaches the age of twenty-three or has completed four years of education beyond the high school level, except that, where his twenty-third birthday occurs during a semester or other enrollment period, he shall continue to be considered a student until the end of such semester or other enrollment period. A child shall not be deemed to have ceased to be a student during any interim between school years if the interim does not exceed five months and if he shows to the satisfaction of the Secretary that he has a bona fide intention of continuing to pursue a full-time course of education or training during the semester or other enrollment period immediately following the interim or during periods of reasonable duration during which, in the judgment of the Secretary, he is prevented by factors beyond his control

from pursuing his education. A child shall not be deemed to be a student under this chapter during a period of service in the Armed Forces of the United States.

(19) The term "national average weekly wage" means the national average weekly earnings of production or nonsupervisory workers on private nonagricultural payrolls.

(20) The term "Board" shall mean the Benefits Review Board.

(21) Unless the context requires otherwise, the term "vessel" means any vessel upon which or in connection with which any person entitled to benefits under this chapter suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charter or bare boat charterer, master, officer, or crew member.

(22) The singular includes the plural and the masculine includes the feminine and neuter.

(Mar. 4, 1927, c. 509, §2, 44 Stat. 1424; June 25, 1938, c. 685, §1, 52 Stat. 1164; Oct. 27, 1972, Pub.L. 92-576, §§2(a), (b), 3, 5(b), 15(c), 18(b), 20(c)(1), 86 Stat. 1251, 1253, 1262, 1263, 1265; Sept. 28, 1984, Pub.L. 98-426, §§2, 5(a)(2), 27(a)(1), 98 Stat. 1639, 1641, 1654.)

33 U.S.C. §903

§903. Coverage

(a) Disability or death; injuries occurring upon navigable waters of United States

Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

(b) Governmental officers and employees

No compensation shall be payable in respect of the disability or death of an officer or employer of the United States, or any agency thereof, or of any State or foreign government, or any subdivision thereof.

(c) Intoxication; willful intention to kill

No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another.

(d) Small vessels

(1) No compensation shall be payable to an employee employed at a facility of an employer if, as certified by the Secretary, the facility is engaged in the business of building, repairing, or dismantling exclusively small vessels (as defined in paragraph (3) of this subsection), unless the injury occurs while upon the

navigable waters of the United States or while upon any adjoining pier, wharf, dock, facility over land for launching vessels, or facility over land for hauling, lifting, or drydocking vessels.

(2) Notwithstanding paragraph (1), compensation shall be payable to an employee—

(A) who is employed at a facility which is used in the business of building, repairing, or dismantling small vessels if such facility receives Federal maritime subsidies; or

(B) if the employee is not subject to coverage under a State workers' compensation law.

(3) For purposes of this subsection, a small vessel means—

(A) a commercial barge which is under 900 lightship displacement tons; or

(B) a commercial tugboat, towboat, crew boat, supply boat, fishing vessel, or other work vessel which is under 1,600 tons gross.

(e) Credit for benefits paid under other laws

Notwithstanding any other provision of law, any amounts paid to an employee for the same injury, disability, or death for which benefits are claimed under this chapter pursuant to any other workers' compensation law or section 688 of Title 46 (relating to recovery for injury to or death of seamen) shall be credited against any liability imposed by this chapter.

(Mar. 4, 1927, c. 509, §3, 44 Stat. 1426; Oct. 27, 1972, Pub.L. 92-576, §§2(c), 21, 86 Stat. 1251, 1265; Sept. 28, 1984, Pub.L. 98-426, §3, 98 Stat. 1640.)

33 U.S.C. §904

§904. Liability for compensation

(a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this title. In the case of an employer who is a subcontractor, only if such subcontractor fails to secure the payment of compensation shall the contractor be liable for and be required to secure the payment of compensation. A subcontractor shall not be deemed to have failed to secure the payment of compensation if the contractor has provided insurance for such compensation for the benefit of the subcontractor.

(b) Compensation shall be payable irrespective of fault as a cause for the injury.

(Mar. 4, 1927, c. 509, §4, 44 Stat. 1426; Sept. 28, 1984, Pub.L. 98-426, §4a), 98 Stat. 1641.)

45 U.S.C. §51

§51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

(Apr. 22, 1908, c. 149, §1, 35 Stat. 65; Aug. 11, 1939, c. 685, §1, 53 Stat. 1404.)

56 U.S.C. §56

§56. Actions; limitations, concurrent jurisdiction of courts

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

(Apr. 22, 1908, c. 149, §6, 35 Stat. 66; Apr. 5, 1910, c. 143, §1, 36 Stat. 291; Mar. 3, 1911, c. 231, §291, 36 Stat. 1167; Aug. 11, 1939, c. 685, §2, 53 Stat. 1404; June 25, 1948, c. 646, §18, 62 Stat. 989.)

Patterson v. CSX Transp., Inc.

Record No. 921044

SUPREME COURT OF VIRGINIA

TERRY LEE PATTERSON

v.

CSX TRANSPORTATION, INC.

1993 VA. LEXIS 62

April 16, 1993, Decided

NOTICE: [*1] THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

PRIOR HISTORY: FROM THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH, Norman Olitsky, Judge

DISPOSITION: Affirmed.

COUNSEL: William S. Sands, Jr. (Howard A. Spier; McChesney, Duncan & Dale; Sams, Spier & Hastings, on briefs), for appellant.

John Y. Richardson, Jr. (David N. Anthony; Williams, Kelly & Greer, on brief), for appellee.

JUDGES: Present: Carrico, C.J., Compton, Stephenson, Whiting, Lacy, and Keenan, JJ.

OPINION BY: BARBARA MILANO KEENAN

OPINION: OPINION BY JUSTICE BARBARA MILANO KEENAN

The sole issue in this appeal is whether the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§ 901-950 (1986), provides the exclusive remedy for an injury sustained by a railroad switch operator, who was injured while uncoupling rail cars for descent onto a waiting barge.

Terry Lee Patterson injured his back while working as a switch operator for CSX Transportation, Inc. (CSX) in Decatur, Alabama. Patterson was working out of CSX's Oakworth Yard along the Main Line River Track, which runs parallel to, and 1/4 mile south of, the Tennessee River. Patterson operated the switches that moved the rail cars [*2] to and from the Main Line Track and the spur tracks. His job also included uncoupling rail cars to be sent down the spur tracks.

At the time he was injured, Patterson was switching cars onto the "boat track" spur, which descends from the Main Line Track to the shore of the Tennessee River. The injury occurred while Patterson was pulling a "cut lever" to uncouple a group of four loaded rail cars onto the boat track. The cars were to proceed onto a waiting barge and be coupled by a member of Patterson's crew positioned on the barge.

As a result of the accident, Patterson allegedly suffered permanent back injuries that prevent him from engaging in his usual occupation. He contends that the accident occurred because the cut lever was defective.

Patterson filed a motion for judgment in the trial court against CSX pursuant to the Federal Employers' Liability Act (FELA), 45 U.S.C. §§51-60 (1986). CSX entered a special plea to the court's jurisdiction, alleging that Patterson's sole remedy is under the LHWCA.

Relying on *Chesapeake & O. Ry. v. Schwalb*, 493 U.S. 40 (1989), the trial court dismissed Patterson's action. [*3] The court ruled that Patterson was covered by the LHWCA because his activities at the time of the injury were an integral part of the barge-loading process.

On appeal, Patterson argues that the trial court erred because his injury did not occur on a covered maritime situs and the task he was performing when injured does not constitute maritime employment. In response, CSX contends that the trial court's ruling was correct because *Patterson* met both the "situs" and "status" tests under the LHWCA. We agree with CSX.

The LHWCA provides a two-prong test for coverage. Under the "status" prong, the worker must be an "employee," which is defined by the LHWCA as a "person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker . . ." 33 U.S.C. §902(3). This list of occupations that constitute "maritime employment" is not all-inclusive. See *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 423 n.9 (1985). Under the second prong, the "situs" test, the disability must have occurred "from an [*4] injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)." 33 U.S.C. §903(a).

In setting forth these definitions in the 1972 Amendments to the LHWCA, Congress sought to eliminate coverage distinctions between longshore work on land and longshore work on navigable waters, so that all such operations would be brought under LHWCA

coverage. *Gray*, 470 U.S. at 426-27. Further, depending upon status and situs determinations, other workers, who are not longshoremen, are included. Id.

In *Chesapeake & O. Ry. v. Schwalb*, the Supreme court addressed a "status" issue involving wholly land-based workers like *Patterson*. In considering whether certain railroad workers, who repaired and maintained loading equipment used to transfer coal from railway cars to ships on navigable waters, were engaged in "maritime employment" pursuant to the LHWCA, the Court stated that the LHWCA covered "all those on the situs [*5] involved in the essential or integral elements of the loading or unloading process." 493 U.S. at 46. Finding that this repair and maintenance work was an integral and essential part of the loading process, the Court emphasized that "it is irrelevant that an employee's contribution to the loading process is not continuous . . . Employees are surely covered when they are injured while performing a task integral to loading a ship." Id. at 47.

In *Schwalb*, the Court also held that the determination whether an activity constitutes "maritime employment" is not altered by the fact that the activity may be described in more than one manner. The Court stated that

> It makes no difference that the particular kind of repair . . . [being performed] might be considered traditional railroad work or might be done by railroad employees wherever railroad cars are unloaded. The determinative consideration is that the ship loading process could not continue . . . [absent the work at issue]. Id. at 48.

We hold that *Schwalb* is determinative of the "status" issue presented here. Patterson's activity [*6] at the time of his injury constituted the inception of the

loading process. As the trial court found, Patterson was injured while attempting to uncouple railway cars in order to move the containers they carried to the boat track. Upon their transfer to the boat track, the cars would move down the track, without interruption, onto the barge. Since the loading process could not be completed without Patterson's work activity, we hold that his activity was essential and integral to that process.

As the Supreme Court observed in *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 270 (1977), containers, such as those on the cars Patterson was attempting to transfer, are a modern substitute for the hold of a vessel because they are moved directly onto the ship without traditional break-bulk cargo handling. Thus, the use of containers has moved the loading and unloading process shoreward, and certain land-based activities, including the one at issue, have become an essential and integral part of the ship-loading process. See id.

Patterson argues, nevertheless, that his injury should not be covered under the LHWCA because such an interpretation [*7] would result in his moving in and out of LHWCA coverage while performing his duties as a switch operator, depending on the destination of the cars that he switched. Whether this result would occur, however, does not impact our decision here. As the Supreme Court indicated in *Schwalb*, such considerations are "irrelevant" because the determinative consideration is whether the activity that is being performed at the time of the injury is integral or essential to loading a ship. 493 U.S. at 47.

Patterson also argues that his injury is not covered by the LHWCA because it did not occur on a maritime situs as defined by 33 U.S.C. §903(a). Specifically, he notes that, unlike the plaintiffs in *Schwalb*, he was not injured at a shore-side marine terminal. Patterson contends that because he was injured on a railway track that was not adjacent to navigable waters and was not exclusively devoted to the process of loading and unloading ships, he does not meet the "situs" test. We disagree.

Initially, we reject Patterson's contention that the area was not a maritime situs because it also was used for overland transfers. [*8] 33 U.S.C. §903(a) requires only that the area be "customarily used" in loading and unloading vessels. In this context, "customarily" does not mean "exclusively." As stated in *Humphries v. Director, Office of Workers Compensation Programs*, 83 F.2d 372, 373 (4th Cir. 1987), *cert. denied*, 485 U.S. 1028 (1988), "a covered situs need not be used exclusively for maritime purposes or be within any specified distance of navigable waters or a 'maritime' operation."

Words in a statute are to be construed according to their ordinary meaning, given the context in which they are used. *Grant v. Commonwealth*, 223 Va. 680, 684, 292 S.E.2d 348, 350 (1982). We hold that, in the context of 33 U.S.C. §903(a), "customarily" means "regularly." See Black's Law Dictionary 385 (6th Cir. 1990). Here, Patterson was injured at a location where rail cars regularly are transferred to the boat track for direct loading onto waiting vessels. Since Patterson was injured at a location in regular use as an integral part of the [*9] loading process of vessels, and since this location was in close proximity to navigable waters, we conclude that it is an "adjoining area customarily used . . . in loading . . .

a vessel." See 33 U.S.C. §903(a); *Newport News Shipbuilding & Dry Dock Co. v. Graham*, 573 F.2d 167, 169 (4th Cir.), *cert. denied*, 439 U.S. 979 (1978).

For these reasons, Patterson met both "status" and "situs" requirements for LHWCA coverage, placing his injury under that exclusive remedy. Accordingly, the trial court did not err in dismissing this action and we will affirm its judgment.

Affirmed.

C.A. No. 87-CV-60145-AA

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
MICHIGAN, SOUTHERN DIVISION

JOSEPH K. SIXBEY,
Plaintiff,

v.

NORFOLK AND WESTERN RAILWAY COMPANY,
Defendant.

1988 U.S. Dist. LEXIS 17986

April 4, 1988, Filed

JUDGES: [*1] PLata

OPINION BY: GEORGE La PLATA

OPINION: ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFF'S FELA CLAIM AND DENYING PLAINTIFF'S MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT

On April 27, 1987, Plaintiff, Joseph Sixbey, filed this action pursuant to the Federal Employer's Liability Act (FELA), 45 U.S.C. §51 et seq. Plaintiff's suit arises out of an accident which occurred at defendant Norfolk & Western Railway's railroad yard located adjacent to the Detroit River. On March 28, 1987, Plaintiff was

injured when he fell while attempting to board a moving railroad car. Plaintiff brought this action under FELA, alleging that he was injured as a result of the unsafe conditions at Defendant's yard. The matter is now before the Court on Defendant's Motion for Summary Judgment. Plaintiff has also filed a Motion for Leave to File a First Amended Complaint.

Defendant's motion is premised on its contention that, under the circumstances of Plaintiff's alleged injury, Plaintiff is precluded from bringing an action under FELA, because his exclusive remedy lies under the Longshoreman's and Harborworker's Compensation Act (LHWCA), 33 U.S.C. §901 et seq. Plaintiff opposes the [*2] motion arguing that (1) he is not covered by the LHWCA and (2) the LHWCA does not preempt FELA.

The pertinent part of the LHWCA provides:

> Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of any employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel.) 33 U.S.C. §903(a).

The LHWCA defines "employees" as:

> . . . any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operation, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker. 33 U.S.C. §902(3).

Two tests must therefore be met for coverage, a "situs" test (injury must occur on U.S. navigable waters) and a "status" test (injured person must be

> engaged in maritime employment). *P.C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69, 79 (1979); *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 264-65 (1977). [*3]

To meet the status test, Plaintiff must have been engaged in "maritime employment" at the time of his injury. Plaintiff herein was injured while he was attempting to board a moving rail car. Plaintiff was acting as a conductor and was engaged in the process of moving cars along Defendant's tracks in order to load them onto barges bound for Canada via the Detroit River. Plaintiff claims that this task was a traditional railroading activity, and not "maritime activity" as that term is used in the LHWCA.

Recent decisions of numerous courts have held that persons who are engaged in the overall process of loading and unloading vessels are covered by the LHWCA. *Northeast Marine, supra; P.C. Pfeiffer, supra; Harmon v. Baltimore & Ohio R.R.*, 741 F.2d 1398 (D.C. Cir. 1984). As the *Pfeiffer* court noted:

> Persons moving cargo directly from ship to land transportation are engaged in maritime employment . . . A worker responsible for some portion of that activity is as much an integral part of the process as a person who participates in the entire process. 432 U.S. at 82-83.

In the instant case, Plaintiff was injured while [*4] engaged in the process of moving railroad cars onto a barge for shipment across the Detroit River. Under these circumstances, the Court must find that Plaintiff was engaged in maritime employment, and that the status test for coverage under the LHWCA is met.

The second test which must be met for coverage under the LHWCA is the "situs" test. Defendant asserts that this test is met because the accident occurred in an

area adjoining the Detroit River which is customarily used for loading and unloading vessels. Plaintiff, on the other hand, asserts that he is not covered by the LHWCA because he was injured in a railroad yard on dry land.

In *Pfeiffer, supra*, the Supreme Court noted that the LHWCA was amended in 1972 to allow coverage of injuries which occurred on land. 444 U.S. at 72-73. In the case at bar, Plaintiff was in the railroad yard adjoining the U.S. navigable waters of the Detroit River. Under 33 U.S.C. §903(a), land area adjoining U.S. navigable waters satisfies the situs test if it is an area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel. The statute defines an "employer" [*5] as:

> (4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). 33 U.S.C. §902(4).

In *Nogueira v. New York, N.H. & H.R. Co.*, 281 U.S. 128 (1930), the Supreme Court held that the definition of "employer" in the Act was broad enough to include a railroad company, "provided it has employees who 'are employed in maritime employment, in whole or in part, upon the navigable waters of the United States.'" *Nogueira* at 132. Further, an area need not be used exclusively nor even primarily for maritime purposes in order for a site to be covered under the LHWCA. *Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 513, 515 (5th Cir. 1980), *cert. denied*, 452 U.S. 905.

In the instant case, although Plaintiff was injured in a railroad yard, the yard is commonly used by Defendant for loading and unloading vessels. [*6] Because Defendant has employees (including Plaintiff) engaged in "maritime employment," Defendant qualifies as an "employer" under the LHWCA, and the railroad yard is a site covered by the LHWCA. Plaintiff is therefore covered by the LHWCA.

Plaintiff alternatively argues that even if he is covered by the LHWCA, the LHWCA is not his exclusive remedy. He asserts that he is simultaneously covered under the LHWCA and FELA, and that he may seek damages under either or both acts.

The LHWCA states, in pertinent part:

> The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer, to the employee . . . and anyone otherwise entitled to recover on account of such injury or death . . . 33 U.S.C. §905.

In *Norgueira, supra,* the Supreme Court held that this provision preempts FELA for railroad workers covered under the LHWCA. 281 U.S. at 131, 136-138. This decision was reaffirmed in *Pennsylvania R. Co. v. O'Rourke,* 334 U.S. 338 (1953). See Also *Harmon, supra; Vogelsang v. Western Maryland Ry. Co.,* 670 F.2d 1347 (4th Cir. 1982). [*7] In accordance with these decisions the Court finds that overlapping coverage does not exist under both FELA and the LHWCA.

Therefore, Defendant Norfolk & Western Railway Company's Motion for Summary Judgment is GRANTED.

Plaintiff has also filed a Motion for Leave to File a First Amended Complaint. In apparent anticipation of this Court's decision on the above issues, Plaintiff has

moved the Court for leave to amend his Complaint to include a negligence claim under the LHWCA, 333 U.S.C. §905(b). The Court notes that Plaintiff failed to provide a proposed amendment for consideration. He does, however, indicate a desire to amend his complaint to allege that Defendant, as vessel owner rather than as Plaintiff's employer, was negligent in failing to paint the sill step from which Plaintiff fell with "non-skid" paint. He alleges that this failure was in violation of the Federal Safety Appliance Act, 45 U.S.C. §§4 and 11. Defendant opposes Plaintiff's motion arguing that amendment at this late date would be unduly prejudicial and that the proposed amendment would be futile.

The court rule governing the amendment of pleadings, Fed. R. Civ. P. 15, is designed to permit a party, [*8] acting in good faith, to amend unless his opponent would sustain undue prejudice. *United States v. Hougham*, 364 U.S. 310, 316 (1960). As set forth in *Foman v. Davis*, 371 U.S. 178, 182 (1962), a motion to amend generally should be granted, and denied only for particularized reasons:

> In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc.—the leave sought should, as the rules require, be "freely given."
>
> The Sixth Circuit Court of Appeals in *Duchon v. Cajon*, 791 F.2d 43, 47 (1986) has held that delay alone is not ordinarily a reason to disallow an amendment of a pleading, but delay may be considered in conjunction with other factors.

Plaintiff filed his motion to amend several months after the close of discovery, only weeks before trial, and only after Defendant filed its Motion for Summary Judgment. Furthermore, the proposed amendment contains [*9] a theory of negligence never before mentioned. To this point, Plaintiff had maintained that he fell from the railcar because there was an oily substance on his shoes. It appears to the Court that Plaintiff has filed this motion in a last-ditch effort to avoid summary judgment. Under these circumstances, the Court finds that Plaintiff's motion has been filed after substantial delay and that to allow amendment at this time would unduly prejudice Defendant.

Accordingly, Plaintiff's Motion for Leave to File a First Amended Complaint is DENIED.

GEORGE La PLATA

U.S. District Judge

April 1, 1988

CIVIL ACTION No. 86-CV-74028-DT

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
MICHIGAN, SOUTHERN DIVISION

ELMER R. RICHARDS,
Plaintiff,

v.

NORFOLK AND WESTERN RAILWAY COMPANY
and CHESAPEAKE & OHIO RAILWAY COMPANY,
and TRAILER TRAIN COMPANY,
Defendants.

1987 U.S. Dist. LEXIS 15674

October 30, 1987, Decided
October 30, 1987, Filed

JUDGES:]*1] DUGGAN

OPINION BY: PATRICK J. DUGGAN

OPINION: OPINION

This suit arises out of an accident which occurred at defendant Norfolk & Western Railway's ("Norfolk") railroad yard adjacent to the Detroit River. Plaintiff was employed by Norfolk as a locomotive engineer. On the day of the accident, plaintiff was operating a locomotive on dry land, moving railroad cars on to a barge for delivery in Windsor. Believing a crew member on the

barge was signalling him to stop, plaintiff applied the brakes. Plaintiff asserts that the sudden stop injured his neck and aggravated a pre-existing arthritic condition.

Plaintiff brought the present action against Norfolk, alleging that he was injured as a result of the unsafe locomotive which he was driving. His Second Amended Complaint includes the following:

> Count I—a claim under the Federal Employers' Liability Act (FELA);
>
> Count II—that plaintiff developed an arthritic condition from being continuously jolted by Norfolk's allegedly defective equipment.
>
> Count III—a claim under the Longshoremen's and Harborworker's Compensation Act ("LHWCA"), 33 U.S.C. §901 et seq.
>
> Count IV—a claim against defendant Trailer-Train Company.
>
> Count V—a claim [*2] against defendant Chesapeake & Ohio Railway Co. ("C&O"), alleging that C&O supplied Norfolk with a defective railroad car, which caused plaintiff's injuries.

Defendant Norfolk has moved for summary judgment on all Counts against it (i.e. Counts I, II, and III) and defendant C&O has moved for summary judgment on Count V.

Plaintiff has filed a Motion for Leave to File Third Amended Complaint.

Counts I and II

Norfolk seeks summary judgment on Counts I and II of plaintiff's Second Amended Complaint on the grounds that LHWCA is plaintiff's sole remedy.

Plaintiff opposes summary judgment, arguing that either (a.) he is not covered by the LHWCA or (b.) the LHWCA does not preempt the FELA.

A. Coverage

The pertinent part of the LHWCA states:

> Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, [*3] dismantling, or building a vessel.)

33 U.S.C. §903(a).

The LHWCA defines "employee" as:

> .... any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker.

33 U.S.C. §902(3).

Thus, two tests must be met for coverage: a "situs" test (injury must occur on U.S. navigable waters) and a "status" test (injured person must be engaged in maritime employment). *Conti v. Norfolk & W. Ry. Co.*, 566 F.2d 890, 893-94 (4th Cir. 1977); *Harmon v. B.&O. R.R.*, 741 F.2d 1398, 1401 (D.C. Cir. 1984); *N.E. Marine Terminal Co. v. Caputo*, 432 U.S. 249, 264-65, 97 S.Ct. 2348, 2357 (1977).

1. The "status" test

To meet the "status" test, plaintiff mus have been engaged in "maritime employment" at the time of his injury. The U.S. Supreme Court, addressing the question of "maritime employment" for the first time in *Northeast Marine Terminal Co., Inc. v. Caputo,* 432 U.S. 249, 97 S.Ct. 2348, 53 L.Ed.2d 320 (1977), [*4] stated:

> The question is made difficult by the failure of Congress to define the relevant terms "maritime employment," "longshoremen," "longshoring operations"—in either the text of the Act or its legislative history. The closest Congress came to defining the key terms is the "typical example" of shoreward coverage provided in the Committee Reports. The example clearly indicates an intent to cover those workers involved in the essential elements of unloading a vessel—taking cargo out of the hold, moving it away from the ship's side, and carrying it immediately to a storage or holding area. The example also makes it clear that persons who are on the situs but are not engaged in the overall process of loading and unloading vessels are not covered. Thus, employees such as truckdrivers, whose responsibility on the waterfront is essentially to pick up or deliver cargo unloaded from or destined for maritime transportation are not covered. Also excluded are employees who perform purely clerical tasks and are not engaged in the handling of cargo.

(Footnotes omitted.) *Northeast Marine Terminal,* at 265-67, 97 S.Ct. at 2358-59. [*5]

The status test is thus an occupational test, not a geographical one. *P.C. Pfeiffer Co., Inc. v. Ford,* 444 U.S. 69, 79, 100 S.Ct. 328, 335, 62 L.Ed.2d 225 (1979).

> The legislature history [of the LHWCA] discusses workers solely in terms of what they are doing and never in terms of where they are working.

* * *

> The crucial factor is the nature of the activity to which a worker may be assigned. Persons moving cargo directly from ship to land transportation are engaged in maritime employment. A worker responsible for some portion of that activity is as much an integral part of the process of loading or unloading a ship as a person who participates in the entire process.

P.C. Pfeiffer at 80-83, 100 S.Ct. 336-37. (Footnotes and citations omitted).

The *P.C. Pfeiffer* Court found that a land-based employee, assigned to fasten military vehicles (which had been delivered to the port by ship several days before) onto railroad flatcars was engaged in maritime employment. Similarly, a land-based employee working as a cotton header unloading bales of cotton from a dray wagon into a pier warehouse for subsequent [*6] transfer onto ships was found to be engaged in an integral part of the loading process and thus maritime employment. *P.C. Pfeiffer* at 71-72, 83, 100 S.Ct. at 331, 337.

In *Harmon v. Baltimore & Ohio R.R.*, 741 F.2d 1398 (D.C. Cir. 1984), an employee of the defendant, Baltimore & Ohio Railroad, was injured while repairing a coal hopper through which coal passed from railroad cars onto ocean-going vessels. The employee, after receiving benefits under the LHWCA, brought suit under the FELA, arguing that he was not engaged in maritime employment, and thus not covered by the LHWCA (i.e., the status test was not satisfied). The plaintiff asserted that he was engaged in the " 'traditional railroading task of unloading railroad cars.' " *Harmon* at 1401.

The *Harmon* court held that the determination whether the plaintiff was engaged in a traditional railroading task was not dispositive of the issue of

coverage under the LHWCA. *Harmon* at 1401. The *Harmon* court further held that the plaintiff was engaged in maritime employment because he was repairing and maintaining equipment used in the loading of ships, [*7] an activity which is "an integral part in the loading and unloading of ships." *Harmon* at 1403-04.

The Fourth Circuit, in *Brice v. Norfolk & W. Ry. Co.* has likewise held that a railroad employee, injured while painting a structure housing a conveyor belt system used to transport grain onto ships, was engaged in maritime employment and thus covered by the LHWCA.

The instant plaintiff was injured while moving railroad cars onto a barge for shipment. Although plaintiff was operating a locomotive at the time of his injury, he was loading cargo on to a vessel. n1 Plaintiff testified at his deposition that he spent approximately 50% of his work shift in such activity. (Plaintiff's deposition at 95). Accordingly, the Court finds that plaintiff was engaged in maritime employment, and the status test for coverage under the LHWCA is met.

[*8]

2. The "situs" test

The second test which must be met for coverage under the LHWCA is the "situs" test. Norfolk asserts that this test is met because the accident occurred in an

n1 Thus, the present action is distinguishable from *Conti v. Norfolk & W.Ry.Co.*, 566 F.2d 890 (4th Cir. 1977), cited by plaintiff. In *Conti*, the Fourth Circuit held that three railroad employees, injured while working at the defendant railroad's terminal on the Elizabeth River in Norfolk, Virginia, were not covered by the LHWCA. Unlike the instant plaintiff, the plaintiffs in *Conti* (brakemen) were not engaged in an essential part of the loading or unloading process. *Conti* at 895. See *Vogelsang v. Western Maryland Ry. Co.*, 670 F.2d 1347, 1348 (4th Cir. 1982) and *Harmon v. Baltimore & Ohio R.R.*, 741 F.2d 1398, 1404 (D.C. Cir. 1984), *distinguishing Conti*. See also *Coniglio v. Norfolk & W.Ry.Co.*, Civil Action No. 86-CV-75261-DT (E.D. Mich. Cohn J.)

area adjoining the Detroit River; an area customarily used for loading and unloading vessels. Plaintiff, on the other hand, asserts that he is not covered by the LHWCA because he was injured in a railroad yard on dry land.

In *P. C. Pfeiffer Co. Inc. v. Ford*, 444 U.S. 69, 100 S.Ct. 328, 62 L.Ed.2d 225, the U.S. Supreme Court noted that the LHWCA was amended in 1972, specifically to allow coverage of injuries which occurred on land. *P.C. Pfeiffer* at 72-73, 80; 100 S.Ct. at 332, 336.

In the present case, the plaintiff was in the railroad yard adjoining the U.S. navigable waters of the Detroit River. Under 33 U.S.C. §903(a), an area adjoining U.S. navigable waters satisfies the situs test if it is an area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel. 33 U.S.C. §902(4) defines an "employer" as:

> (4) the term "employer" means an employer any [*9] of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

33 U.S.C. §902(4).

In *Nogueira v. New York, N.H. & H.R. Co.*, 281 U.S. 128, 50 S.Ct. 303, 74 L.Ed. 754 (1930), the U.S. Supreme Court held that the definition of "employer" in the LHWCA was broad enough to include a railroad company, "provided it has employees who 'are employed in maritime employment, in whole or in part, upon the navigable waters of the United States,' " *Noguiera* at 132, 50 S.Ct. at 304. Further, an area need not be used exclusively nor even primarily for maritime purposes in

order for a site to be covered under the LHWCA. *Texports Stevedore Co. v. Winchester*, 632 F.2d 501, 513, 515 (5th Cir. 1980), *cert. denied*, 452 U.S. 905; *Perkins v. Marine Terminals Corp.*, 673 F.2d 1097, 1101-02 (9th Cir. 1982). [*10]

In the present case, although the plaintiff was injured in a railroad yard, the yard is commonly used by defendant Norfolk for loading and unloading vessels. Because Norfolk has employees engaged in "maritime employment," n2 Norfolk qualifies as an "employer" under the LHWCA, and the railroad yard is a site covered under the LHWCA. n3

[*11]

Accordingly, the plaintiff is covered by the LHWCA.

B. LHWCA is an Exclusive remedy

Plaintiff next argues that even if he is covered by the LHWCA, the LHWCA is not his exclusive remedy; plaintiff asserts that he is simultaneously covered under the LHWCA and the FELA, and that damages may be sought under either or both acts.

The pertinent part of the LHWCA (33 U.S.C. §905) states:

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n2 The question of "maritime employment" is discussed in part I.A.1 of this opinion; the loading of railroad cars (or other cargo) onto ships (as performed by the plaintiff and his co-workers) is maritime employment within the meaning of the LHWCA.

n3 The Court has read the Bench Opinion of Judge Phillip Jourdan, Wayne County Circuit Court Judge, in *Gruber v. Norfolk & Western Ry. Co.*, No. 86-621503NO, attached to plaintiff's Supplemental Submission in Opposition to Defendant's Motion for Summary Judgment. The Court does not agree with the reasoning of the *Gruber* court and finds that that decision is contradicted by the *Texports Stevedore Co.* and the *Perkins* cases, cited previously. Therefore, the Court declines to follow that holding in this case.

> The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer, to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death. . . . (Emphasis added.)

In *Nogueira v. New York, N.HY. & H.R. Co.*, 281 U.S. 128, 50 S.Ct. 303, 74 L.Ed. 754 (1930), the U.S. Supreme Court held that this provision of the LHWCA preempts the F.E.L.A. for railroad workers covered under the LHWCA. *Nogueira* at 131, 136-38, 50 S.Ct. at 303, 305-06. The Supreme Court reaffirmed this decision [*12] twenty-three years later in *Pennsylvania R. Co. v. O'Rourke*, 334, 338, 73 S.Ct. 302, 304, 97 L.Ed. 367 (1953).

More recently, the District of Columbia Circuit and the Fourth Circuit (affirming a district court opinion) have held that railroad employees who are covered by the LHWCA may not recover under FELA; the LHWCA is the exclusive remedy. *Harmon v. Baltimore & Ohio R.R.*, 741 F.2d 1398, 1405 (D.C. Cir. 1984); *Vogelsang v. Western Maryland Ry. Co.*, 670 F.2d 1347 (4th Cir. 1982), affirming 531 F.Supp. 11, 13 (D. Maryland 1981).

Accordingly, the Court finds that overlapping coverage does not exist under both the LHWCA and the FELA. n4 The plaintiff in this case was covered under

---

n4 The plaintiff argues that because the U.S. Supreme Court in *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 100 S.Ct. 2432, 65 L.Ed. 2d 458 (1980), held that simultaneous coverage may exist under the state workers' compensation laws and the LHWCA, simultaneous coverage may also exist under the LHWCA and the FELA. This Court agrees with the opinion of the Court in *Harmon*, and finds that the Supreme Court's *Sunship* decision does not compel the conclusion that simultaneous coverage exists under the FELA and the LHWCA. *Harmon v. Baltimore & Ohio R.R.*, 741 F.2d 1398, 1405 (D.C. Cir. 1984).

the LHWCA, and therefore may not recover under the FELA for his injury which occurred on July 16, 1986 and is described in Counts I and II of his Second Amended Complaint. Thus, Counts I and II must be DISMISSED.

[*13]

Plaintiff has also filed a Motion for Leave to File Third Amended Complaint. Plaintiff seeks to amend Count II of his Complaint to clarify that the occupational disease complained of was not incurred in defendant Norfolk's railroad yard adjacent to the Detroit River and did not occur on a situs covered by the LHWCA. Thus, plaintiff seeks to recover under FELA for his arthritic condition.

Defendant opposes plaintiff's motion, arguing that plaintiff should not be allowed to deny that his arthritis was aggravated by the July 16, 1988 incident simply because that incident is not covered under the FELA.

Fed.R.Civ.P. 15(a) allows a plaintiff to amend his or her Complaint with leave of the Court, and provides that "leave shall be freely given where justice so requires." In *Foman v. Davis*, 371 U.S. 83 S.Ct. 227 (1962), the U.S. Supreme Court held that, if the underlying facts of a case indicate that the plaintiff may be entitled to relief the plaintiff should be allowed to test his or her claim on its merits. *Foman* at 230. The Court stated:

> "In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the [*14] part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing

> party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be "freely given."

Foman at 230.

In the present case, the Court finds that plaintiff's proposed amendment would not be futile, and would not cause undue prejudice to the defendant. Further, the Court finds no evidence of bad faith on the part of plaintiff, and finds that plaintiff has not delayed an unreasonable length of time in bringing his motion to amend. Therefore, plaintiff's Motion for Leave to File Third Amended Complaint should be granted.

II. Count III

Defendants Norfolk and C&O seek dismissal of Count III based on an oral statement by plaintiff's counsel that he would drop that count. There is nothing in writing, nor on the record to substantiate any agreement between the parties. In addition, plaintiff received no consideration for agreeing to drop Count III, and defendants have not detrimentally relied on plaintiff's statement.

Plaintiff's counsel states that he has now reconsidered, and does not intend [*15] to drop Count III. In the absence of a binding settlement agreement between the parties, the Court finds that summary judgment cannot be granted on this basis.

Norfolk also asserts that it is entitled to dismissal of Count III, plaintiff's claim under the LHWCA, because plaintiff has failed to state a cause of action. In Count III, plaintiff claims that Norfolk is liable, not as plaintiff's employer (under §905(a)), but as the owner of the vessel which plaintiff was loading, (under §905(b)).

Defendant asserts that plaintiff's allegations of liability are unrelated to defendant's duties as a shipowner, and therefore, defendant cannot be liable under §905(b).

33 U.S.C. §905(b) provides:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person . . . may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title. . . . If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel.

The term "vessel" [*16] means:

> Any vessel upon which or in connection with which any person entitled to benefits under this chapter suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charter or bare boat charterer, master, officer, of crew member. 33 U.S.C. §902(21).

The U.S. Supreme Court, in *Scindia Steam Navigation Co., Ltd. v. De Los Santos*, 451 U.S. 756, 101 S.Ct. 1614, 68 L.Ed.2d 1 (1981), defined the liability of a vessel owner:

> The shipowner . . . has a duty with respect to the condition of the ship's gear, equipment, tools, and work space to be used in the stevedoring operations; and if he fails at least to warn the stevedore of hidden danger which would have been known to him in the exercise of reasonable care, he has breached his duty and is liable if his negligence causes injury to a longshoreman. Petitioner concedes as much. It is also accepted that the vessel may be liable if it actively involves itself in the cargo operations and

> negligently injures a longshoreman or if it fails to exercise due care to avoid exposing longshoremen to harm from [*17] hazards they may encounter in areas, or from equipment, under the active control of the vessel during the stevedoring operation.
>
> * * *
>
> As a general matter, the shipowner may rely on the stevedore to avoid exposing the longshoremen to unreasonable hazards. Section 41 of the Act, 33 U.S.C. §941, requires the stevedore, the longshoremen's employer, to provide a "reasonably safe" place to work and to take such safeguards with respect to equipment and working conditions as the Secretary of Labor may determine to be necessary to avoid injury to longshoremen. The ship is not the common employer of the longshoremen and owes no such statutory duty to them.

(Citation omitted; footnote omitted.) 451 U.S. at 167-170, 101 S.Ct. at 1622-24.

Despite the exclusive liability provision of §905(a), an employer who is also the vessel owner may be liable under §905(b) for its negligence. *Cavalier v. T. M. Smith & Son, Inc.*, 888 F.2d 861, 862 (5th Cir. 1982); *Griffith v. Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31, 41-43 (3rd Cir. 1975); *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 531-32; [*18] 103 S.Ct. 2541, 2547-48, 76 L.Ed.2d 768 (1983). A vessel owner responsible for loading and unloading activities (as in the present case), however, is liable under §905(b) only for negligence in its capacity as shipowner, not in its capacity as stevedore. *Jones & Laughlin Steel Corp.* at 532 n. 6; 103 S.Ct. at 2547 n.6; *Robertson v. Jeff Boat, Inc.*, 651 F.2d 434, 435 (6th Cir. 1983). With regard to the ship's cargo, the shipowner's liability is limited to those instances where the shipowner knew or should have known of the dangerous condition. *Castorina* at 1035; *Harris v. Flota*

Merchante Grancolombiana, S.A., 730 F.2d 296, 299 (5th Cir. 1984). Once loading or unloading operations have begun, however, a shipowner is not liable for open and obvious dangers unless the shipowner is aware that the stevedore would not take adequate precautions. *Helaire v. Mobil Oil Co.*, 709 F.2d 1031, 1038-39 (5th Cir. 1983); *Scindia* at 172, 101 S.Ct. at 1624. [*19]

In the present case, the plaintiff was injured during the loading process, by an allegedly defective coupler on a railroad car which plaintiff was loading onto the vessel. Norfolk, as shipowner, had a duty to correct dangerous conditions existing with regard to the railroad cars (cargo) being loaded, and may be liable as a shipowner under the LHWCA, provided that it had knowledge of the existing condition. If the condition was open and obvious, however, Norfolk is liable only if it knew of the dangerous condition, and knew that the stevedore would not take adequate precautions. The Court finds that genuine issues of material fact exist, precluding a grant of summary judgment for defendant. Fed.R.Civ.P. 56(c). *Environmental Defense Fund v. Marsh*, 651 F.2d 983, 991 (5th Cir. 1981). Issues of fact exist regarding whether Norfolk (as shipowner) was aware of the allegedly defective coupler, whether the coupler was, in fact, defective and whether the coupler was the cause of plaintiff's injury. n5 Therefore, defendant's Motion for Summary Judgment on Count III must be denied.

---

n5 Norfolk also argues that it cannot be liable as a shipowner under the LHWCA because §905(b) provides that there is no recovery against a vessel owner if the injury was caused by the negligence of persons providing stevedoring services to the vessel. Norfolk asserts that it was the negligence of plaintiff's co-workers that caused the injury, and, because the co-workers were engaged in stevedoring services, Norfolk is not liable. The Court finds that the cause of plaintiff's injury is a question of fact.

[*20]

III. Count V

In Count V, plaintiff alleges that defendant C&O provided Norfolk with a defective railroad car, in violation of an interchange agreement between Norfolk and C&O, and in breach of C&O's duty of care to plaintiff under the Federal Safety Appliance Act (45 U.S.C. §1 et seq.) ("FSAA"). Plaintiff also states a claim for common law negligence (i.e., the breach of C&O's duty not to provide plaintiff's employer with a defective car).

C&O seeks summary judgment on Count V on the grounds that (1) the FSAA was not violated; (2) if a violation occurred, it was by Norfolk, not C&O; and (3) the FSAA is not applicable to the present case. C&O also argues that no violation of the interchange agreement occurred.

The applicable section of the FSAA states:

> It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars. 45 U.S.C. §2.

This section imposes strict liablility on a railroad for injuries [*21] sustained when the automatic couplers fail to perform correctly; neither the railroad's diligence nor the absence of a defect in the coupler is relevant to the issue of liability. *Carter v. Atlanta & St. Andrews Bay Ry. Co.*, 338 U.S. 430, 70 S.Ct. 226, 229, 94 L.Ed. 236 (1949); *Coleman v. Burlington*, 681 F.2d 542, 544-45 (8th

Cir. 1982); *Maldonado v. Missouri Pacific Ry. Co.*, 798 F.2d 764, 767 (5th Cir. 1986). The purpose of the FSAA was to avoid the risks incurred by railroad employees going between railroad cars. *Maldonado* at 767; *United Transportation Union v. Lewis*, 711 F.2d 233, 243-47 (D.C. Cir. 1983). In this Circuit, a plaintiff demonstrates a violation of §2 by establishing that the couplers failed to couple automatically on the impact in question, or failed to remain coupled until released. *Clark v. Kentucky & Indiana Term. RR.*, 728 F.2d 307, 310 (6th Cir. 1984).

At his deposition, the plaintiff testified he coupled the allegedly defective railroad car without a problem. (Plaintiff's deposition, at 35-36). The plaintiff [*22] testified that he was injured when he applied the brake, and the defective car jerked the plaintiff's car. (Plaintiff's deposition, p. 94).

The Court finds that in his instance, the automatic couplers functioned as required by the FSAA. Therefore, plaintiff has failed to state a claim for violation of the FSAA.

Further, even if the automatic couplers had failed to function, plaintiff still would not have a claim for violation of the FSAA against C&O. The FSAA makes it unlawful for a railroad to operate railroad cars without automatic couplers on its line; at the time of the accident, the allegedly defective car was on Norfolk's line.

Similarly, under the interchange agreement, each railroad is responsible for the condition of the cars on its line. (Rule 1 of Interchange Agreement). Because the car which caused plaintiff's injuries was on Norfolk's line at the time of the accident, C&O cannot be liable to plaintiff for a violation of the agreement. Thus, plaintiff cannot

state a claim against C&O under either the FSAA or the interchange agreement, and those claims contained in *Count V must be dismissed*. Plaintiff's remaining claim in Count V, for common law negligence, [*23] remains.

An Order reflecting the above will be issued.

PATRICK J. DUGGAN, UNITED STATES DISTRICT JUDGE

DATED: OCT 30 1987

Case No. 1:91CV1022

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

GEORGE R. STOWERS,
Plaintiff,

vs.

CONSOLIDATED RAIL CORPORATION,
Defendant.

JUDGE ALDRICH

Deposition of GEORGE R. STOWERS, taken as if upon cross-examination before M. Sheila Hanlon, a Notary Public within and for the State of Ohio, at the offices of Gallagher, Sharp, Fulton & Norman, Sixth Floor Buckley Building, Cleveland, Ohio, at 3:15 p.m. on Friday, December 13, 1991, pursuant to notice and/or stipulations of counsel, on behalf of the Defendant in this cause.

* * * * *

[35] Q. On this particular day, the day of the accident, you were simply working the harbor yard, is that correct? A. Yes.

Q. Now, at the harbor yard, if you don't do your job and take these coal cars away, what would happen to these coal cars? A. They would probably plug the machine, you know.

Q. So if you weren't taking these cars away, they couldn't continue to bring in the coal cars to load the ships? A. Well, I don't know. If they had another engine somewhere to come down and do it, they could.

Q. But my point is, that engine is necessary for that ship-loading to continue, is that right? Either you running it or somebody else running it? A. Yes.

Q. Okay. On the day of your accident, do you remember what time you started? A. I think the job started at 7:00 or 8:00.

Q. In the morning? A. Yes.

* * * * *

Supreme Court, U.S.
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No. 92-1790

In The

Supreme Court of the United States

October Term, 1992

CONSOLIDATED RAIL CORPORATION,

Petitioner,

– *vs.*

GEORGE R. STOWERS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a locomotive engineer at a switchyard facility under the supervision of a railroad trainmaster and yardmaster that services two docking companies is engaged in "maritime employment" for purposes of the LHWCA when his duties vis-a-vis the docking companies consist solely of dropping off ("spotting") and picking up loaded or empty railroad freight cars which the docking company employees, under dock company supervision, load or unload?

2. Whether the "back track" of the Harbor Yard, where Respondent was injured, constitutes a "maritime situs" for purposes of the LHWCA, when the Harbor Yard does not satisfy the shipping industry's definition of "marine railway," and when the "back track" was not used for functions integral to the loading and unloading of maritime vessels, and contained no equipment used for loading or unloading the railroad freight cars, but was utilized only for the standard railroad functions of "bad order" set off and train classification?

3. Whether a railroad common carrier that operates a switchyard facility for the purpose of servicing two docking companies is a "maritime employer" under the LHWCA when, although one docking company is a corporate affiliate of the common carrier, the railroad operation and docking company are operated entirely separately, with separate employees, separate supervisors, and separate facilities, and when only the docking company employees, and not the railroad employees, service and operate all equipment integral to the loading and unloading of maritime vessels?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Citations	iii
Respondent's Supplemental Statement of Federal Statutes at Issue	1
Statement of the Case	2
A. Procedural Facts.	2
B. Facts Material to the Questions Presented.	5
C. Statement of Additional Inaccuracies and Omissions Contained in Petitioner's Brief.	10
Reasons for Denying the Writ	12
I. Summary of Argument	12
II. The Sixth Circuit's holding comports with the LHWCA's statutory intent to exempt from coverage workers, such as Respondent, whose "responsibility on the waterfront is essentially to pick up or deliver cargo unloaded from or destined for maritime transportation." *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249 (1977)	13

Contents

Page

III. The Sixth Circuit's holding is not inconsistent with cases which find railroad workers to be covered by the LHWCA when the tasks they perform are directly and integrally related to the loading and unloading maritime vessels. 16

IV. The switchyard crew's function of "spotting" full freight cars at the dumper, and pulling away empties after the docking company employees have unloaded them, cannot soundly be characterized as the "operation" of equipment essential to the loading and unloading process. .. 20

V. The Sixth Circuit did not err in relying on *Conti v. Norfolk & Western Railway Co.*, 566 F.2d 890 (4th Cir. 1977) 22

VI. The back track where Respondent was injured is not a "maritime situs"; and the harbor yard is not a "marine railway." 25

VII. The railroad common carrier (Conrail) by whom Respondent was employed was not an "employer" for purposes of the LHWCA. 28

Conclusion 30

TABLE OF CITATIONS

Cases Cited:

Avondale Marine Ways v. Henderson, 346 U.S. 366 (1952) 27

Contents

Page

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 30

Chesapeake & Ohio Railway Co. v. Schwalb, 493 U.S. 40 (1989) 17, 18, 21, 25

Conligio v. Norfolk & Western Ry. Co., 670 F. Supp. 1353 (E.D. Mich. 1987) 11, 28

Conti v. Norfolk & Western Railway Co., 566 F.2d 890 (4th Cir. 1977) 22, 23, 24, 25

Harmon v. Baltimore & Ohio Railroad, 741 F.2d 1398 (D.C. Cir. 1984) 24, 25

Hayes v. CSX Transporation, Inc., 985 F.2d 137 (4th Cir. 1993) 24

Maryland Casualty Co. v. Lawson, 101 F.2d 732 (5th Cir. 1939) 27

Norfolk Western Railway Co. v. Goode, 493 U.S. 40 (1989) 17

Northeast Marine Terminal Co., Inc. v. Caputo, 432 U.S. 249 (1977) 13, 14, 15, 17, 18, 21, 22, 24, 25

Patterson v. CSX Transportation, Inc., unreported, Case No. 921044 (Va. S. Ct. 4/16/93) 11, 16, 28

P.C. Pfeiffer Co., Inc. v. Ford, 444 U.S. 69 (1979) .....
.....15, 18, 21, 22, 24, 25

Contents

Page

Pennsylvania Railroad Co. v. O'Rourke, 344 U.S. 334 (1952) 10, 11, 16

Price v. Norfolk & Western Ry. Co., 618 F.2d 1059 (4th Cir. 1980) 25

Richards v. Norfolk & Western Ry. Co., unreported, No. 86-CV-74028-DT (E.D. Mich. 10/30/87) 11, 16, 25, 28

Sea-Land Service, Inc. v. Dir. Office of Workers' Compensation Programs, etc., 540 F.2d 629 (3rd Cir. 1976) 19

Sixbey v. Norfolk & Western Ry. Co., unreported, C.A. No. 87-CV-60145-AA (E.D. Mich. 4/4/88) 11, 16, 28

St. Louis Shipbuilding v. Dir. of Office of Workers' Comp., etc., 551 F.2d 1119 (8th Cir. 1977) 27

Stockman v. John T. Clark & Son of Boston Inc., 539 F.2d 264 (1st Cir. 1976), cert. denied, 433 U.S. 908 (1977) 18

Union Shipbuilding Co. v. Boston Iron & Metal Co., 17 F. Supp. 318 (D. Md. 1936) 27

Vogelsang v. Western Maryland Railway Co., 670 F.2d 1347 (4th Cir. 1982) 24, 25

Statutes Cited:

33 U.S.C. § 901, et seq. 3

Contents

Page

33 U.S.C. § 902(3) 3, 13

33 U.S.C. § 902(4) 3, 12, 28

33 U.S.C. § 903(a) 2, 3, 10, 12, 26, 27

33 U.S.C. § 904 28

45 U.S.C. § 51 1

45 U.S.C. § 51-60 2

45 U.S.C. § 56 1

Other Authority Cited:

S. Rep. 13, H.R. Rep. 10-11, U.S. Code Cong. & Admin. News 1972, p. 4708 14

APPENDIX

Appendix A — 45 U.S.C. §§ 51,56 ..... 1a

Appendix B — Excerpts from the Congressional History of the 1972 Amendment to the LHWCA, U.S. Code Cong. & Admin. News 1972, pp. 4707-4708 ..... 3a

Appendix C — Excerpts from the Affidavit of George R. Stowers 6a

Appendix D — Excerpts from the Deposition of Carl Englund 11a

No. 92-1790

In the

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October Term, 1992

CONSOLIDATED RAIL CORPORATION,

Petitioner,

vs.

GEORGE R. STOWERS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

RESPONDENT'S SUPPLEMENTAL STATEMENT OF FEDERAL STATUTES AT ISSUE

In addition to the statutory provisions cited by Petitioner, Respondent notes that, although this case does not involve construction of the Federal Employers Liability Act (FELA), 45 U.S.C. §§ 51, 56, Respondent, as an injured railroad worker, is entitled to bring his cause of action under those FELA provisions, which are set forth in Respondent's Appendix. Additionally, Respondent notes that Petitioner failed to set forth the following

relevant LHWCA provision, 33 U.S.C. § 903(a), which specifies what injuries the LHWCA intends to cover, and defines the maritime "situs" requirement:

> § 903. Coverage
>
> (a) Disability or death; injuries occurring upon navigable waters of United States
>
> Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

STATEMENT OF THE CASE

A. Procedural Facts.

On May 24, 1991, Plaintiff-Respondent George Stowers filed the instant action in the United States District Court for the Northern District of Ohio against his employer, Defendant-Petitioner, Consolidated Rail Corporation (Conrail). The complaint sought damages, pursuant to the Federal Employers Liability Act (FELA), 45 U.S.C. §§ 51-60, for personal injuries sustained by Mr. Stowers in the course of his employment as a locomotive engineer of a switchyard crew at Conrail's Ashtabula Harbor Yard. Contrary to Petitioner's assertion (Petitioner's Brief, p. 5), Mr. Stowers was *not* an employee of the Conrail Coal Dock Company, which was a separately run operation from the Conrail

railroad operation. Rather, the Conrail railroad company operated the Harbor Yard facility as a typical industrial switchyard servicing two companies: the Conrail Coal Dock Company and the Penney Dock Company.

Mr. Stowers' complaint sought recovery solely under the FELA, and not under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§ 901, *et seq.* Nevertheless, in its answer, and subsequent motion for summary judgment,[1] Conrail moved to dismiss Mr. Stowers' action on the ground that the District Court lacked subject matter jurisdiction over his FELA claim because his injury, which occurred when the locomotive he was operating in the Harbor Yard's "back track" ran over a derailing device, fell within the exclusive jurisdiction of the LHWCA.

Ruling that the Harbor Yard's "back track" constituted a "maritime situs" under 33 U.S.C. § 903(a), that the Conrail railroad operation was a "maritime employer" under 33 U.S.C. § 902(4), and that Mr. Stowers was engaged in "maritime employment" under 33 U.S.C. § 902(3), the District Court granted Petitioner's motion for summary judgment, and dismissed the complaint for lack of subject matter jurisdiction.

Mr. Stowers appealed the judgment to the United States Court of Appeals for the Sixth Circuit. On February 8, 1993, the Sixth Circuit reversed, and remanded the case for trial of Mr. Stowers' FELA claim. The majority found that the LHWCA did not apply because Mr. Stowers was not engaged in "maritime employment," as his duties in relation to the docking companies did not involve the loading and unloading of maritime vessels, but were merely the first or last stage in overland transportation. Noting that the limits

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1. Upon suggestion of the District Court, the parties filed Cross-Motions for Summary Judgment on the jurisdictional issue.

to which Conrail sought to force LHWCA coverage here far exceeded the boundaries of any prior holdings (all of which are distinguishable as involving loading and unloading activities, or maintenance or repair functions that facilitated those activities), the majority reasoned that

> [a]s the unique facts of each case are presented, *the line must be drawn somewhere. We find that common sense dictates that, on the facts of this case, it be drawn where one form of transportation ceases and the other begins.* The switchyard crew's duties were part of the first or last stage of the overland railroad shipment of cargo. The crew's duties were the same as they would have been at any other railroad switchyard servicing another type of industry in which railroad cars are loaded or unloaded by another trade, employer, or business entity. *Stowers did not participate in the loading or unloading of the ships, or even of the rail cars, and therefore he certainly was not engaged in an "essential or integral" part of the shiploading process. He hauled the rail cars to the docks for dock employees to load or unload, and he hauled them away when dock employees were finished loading or unloading.* The overland transportation began and ended with the work of Stowers and the switchyard crew.

985 F.2d at 297 (emphasis added). One judge dissented, finding that all requirements of the LHWCA were met. Although the majority did not reach the "situs" issue, the dissenting judge found the "back track" to be a "maritime situs" by construing the term "marine railway" to include all railroad switchyard facilities

located near water and servicing docking companies. 985 F.2d at 298.

On February 23, 1993, Petitioner filed a Petition for Rehearing and Request For En Banc Consideration. On April 6, 1993, both were denied. Thereafter, on May 11, 1993, the Petition For Writ of Certiorari was filed. Respondent respectfully submits that, as this case involves no true conflict with the cases Petitioner cites, and indeed is in accord with prior Supreme Court rulings as well as the statutory intent of the LHWCA, the Petition For Writ of Certiorari should be denied.

B. Facts Material To The Questions Presented.

Mr. Stowers' injury occurred on March 21, 1991 while he was performing his assigned duties as a locomotive engineer on the "back track" of the Ashtabula Harbor Yard. He was pulling a drag of 60-80 empty coal hopper cars, for the purpose of setting several "bad order" cars out for repairs,[2] so that the remaining cars could be made up for trains for transportation in interstate commerce.

Heading southbound on the "back track," Mr. Stowers ran over a "de-rail" device placed on the track by a Conrail track repair gang. The locomotive derailed off the track, throwing Mr. Stowers against the windshield and onto the floor, causing him to sustain serious and permanent injuries.

Mr. Stowers had been employed as an engineer or fireman by

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2. Although, at p. 8 of its Brief, Petitioner describes the bad order cars as "cars in need of repair as a result of damage inflicted by the mechanical dumper . . . ," *there is absolutely no evidence in the record as to what caused the damage to the bad order cars on this, or any other, occasion.* Petitioner may not speculate that they were damaged during the dumping process, when they could as easily have been damaged during the over-the-road operations, or while being moved within the Harbor Yard itself.

Conrail since 1950. For most of those years he was part of an over-the-road crew. In 1989, he transferred to Conrail's Ashtabula Harbor Yard.

The Ashtabula Harbor Yard is a switchyard facility jointly used by Conrail and Pittsburgh & Lake Erie Railroad. In function, it parallels Conrail's other industrial switchyard facilities that service Chrysler, Ford, and the Cleveland Electric Illuminating Company. At each of these facilities, the Conrail switchyard crew takes cars brought in by over-the-road transportation crews, drops them off (or, in railroad parlance, "spots" them) where the industry being serviced wants them, then transports empty, or newly-loaded, cars for further shipment through interstate commerce.

Two docking companies are serviced by the Ashtabula Harbor Yard: the Conrail Coal Dock Company and the Penney Dock Company. The Conrail Coal Dock Company receives coal brought in by the railroad from mining operations in West Virginia, Pennsylvania, and other points south. Upon receipt of the coal-filled cars, the Coal Dock workers, not the railroad workers, operate the mechanical dumping equipment used to unload the cars. This means that docking company employees alone, not the switchyard crew, operate the retarders that lock the coal cars into place in the dumper,[3] the mechanical devices which cause the

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3. Petitioner makes much ado about the Sixth Circuit's statement that "Stowers would lock the coal-filled cars into a mechanical dumper." However, apart from not being dispositive of the matter, this statement is not accurate. The testimony was that the switchyard crew backed the train of loaded cars into the dumper, the last of the string actually protruding within it, then cut the engine and pulled away. Then docking company employees, not the switchyard crew, actually "locked" the cars into the dumper. The statement that the switchyard crew "locked" the coal cars into the dumper may have originated from some confusing syntax in train master Englund's deposition testimony:

(Cont'd)

freight cars to overturn and which eject the unloaded cars from the dumper, and the conveyor belts through which the product is shuttled eventually onto Great Lakes ships. The Penney Dock Company, on the other hand, receives imported products — mostly iron ore and fertilizers — from maritime vessels coming in from the Great Lakes. Upon receipt, the Penney Dock transfers these products from the vessels onto railroad cars for further delivery through interstate commerce by railroad.

The Penney Dock Company has no common corporate heritage with Petitioner; and its facilities and operations are entirely separate from the railroading operation. Only the dock company workers unload the incoming products from the maritime vessels and onto the outbound freight cars. The switchyard crew merely drops off empties, and pulls them away after they have been loaded.

Likewise, although the Conrail Coal Dock Company is owned by Conrail, it functions separately from the railroading operation.

(Cont'd)

> Q. Well, mechanically, I'm not familiar with it, I've never seen it, but the car obviously has to be spotted in some way in relation to the dumper in order to be dumped. A. Yes. *The yard crew pushes it up into the dumper and they grab it with a set of retarders and hold it for a mechanical arm.*
>
> Q. Then *all of that equipment is operated by coal dock people*, correct? A. *Yes, sir.*

(Englund Depo., App. 14a). The confusion inheres in the use of the word "they" in the first quoted answer. While, at first glance, this pronoun seems to refer to the yard crew, when read in conjunction with the second quoted answer, as well as the testimony of Mr. Stowers, it must be understood to refer, rather, to the docking company employees. (Stowers' Aff., App. 6a-10a; Englund Depo., App. 12a-14a.)

The delivery services provided by the railroad to the Coal Dock Company are provided by virtue of a contract. The Coal Dock Company has its own management and supervision separate and distinct from the supervision of the Harbor Yard. *The Coal Dock Company employees perform all the loading and unloading operations, as well as all the maintenance and repair of the loading and unloading equipment.* The Coal Dock facilities, themselves, are separate and distinct from the Harbor Yard. The switchyard crew's function at the Coal Dock facilities is merely to drop off, *i.e.*, "spot," cars where the Coal Dock needs them, *i.e.*, at the dumper, and, afterwards, to pull them away. Mr. Stowers testified that spotting them at the dumper involved backing the last car of the train into the dumper, cutting off the engine, and driving away.

The yard switching crew to which Mr. Stowers belonged consisted of himself as locomotive engineer, one conductor, and one brakeman. The job assignment is designated as "YIAS-11." This is a regular yard switching job of Conrail within its Pittsburgh division. The job is obtained in accordance with Conrail bidding seniority procedures through the Conrail crew dispatcher's office in Pittsburgh.

In addition to spotting and picking up cars from the docking facilities, the YIAS-11 crew performs other typical railroad functions. It may be sent by the yard master to other Conrail facilities, such as the West Yard or the CEICO facility which services the Ashtabula branch of the Cleveland Electric Illuminating Company. The YIAS-11 crew also crosses public gradings and switches in accordance with federal regulations. Other operations within the Harbor Yard include train classification for interstate commerce.

Operations within the Harbor Yard are under the exclusive supervision of Conrail through its train master and yard master.

The train master oversees the operation and supervises railroad crews; his jurisdiction encompasses territories beyond the Harbor Yard, including supervision of over-the-road crews. The yard master is responsible for the entire operation at the Harbor Yard, including the making up of trains, directing the spotting and pulling away of cars, kicking out "bad orders," and making sure that trains are inspected by car inspectors. Neither the train master, the yardmaster, nor any of the railroad's other supervisors supervise any of the docking companies' employees; nor are the railroad employees supervised by docking company supervisors. Although Conrail claims that railroad employees could be "supervised" by docking company employees, it is apparent that this means no more than that the docking company, as a customer, may indicate to the switchyard crew where it needs the railroad cars spotted. It is absolutely undisputed that the railroad crew never operated the machinery used to load or unload products from the freight cars.[4]

The "back track," where Mr. Stowers was injured, is a lead track in the Harbor Yard, used for train classification and bad order setoff as part of the railroad's operation. It is entirely supervised by railroad personnel; it is not within the dock companies' facilities; and dock company employees have no occasion to use it.

Finally, there was no evidence that any of the railroad tracks at the Harbor Yard were the sort of paired railroad tracks that descend below the water level and are used as an alternative to dry docks to

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4. Petitioner's argument that Mr. Stowers "operated" loading/unloading equipment because he hauled the freight cars which were subsequently unloaded by the docking company does not figure into the foregoing statement, as that argument does not represent a fact, but, at best, represents an attempt to redefine the term "operate" beyond its common-sense, customary meaning of operating the actual equipment (mechanical arms, conveyors, etc.), used to dump cars and shuttle coal onto maritime vessels.

pull maritime vessels out of the water. In other words, there was no evidence that the Harbor Yard is what the drafters of the LHWCA intended when, in 33 U.S.C. § 903(a), they defined maritime situs as including a "marine railway."

C. Statement of Additional Inaccuracies And Omissions Contained In Petitioner's Brief.

Throughout its statement of facts and argument of the law, Petitioner repeatedly mischaracterizes the facts in a way that it had not done before the Sixth Circuit and the District Court. The issue in this case has always been *whether the switchyard crew's delivery function will be deemed "maritime employment" despite the fact that the switchyard crew did not manually, or throuqh operation of mechanical equipment, load or unload the railroad cars or perform any related function, such as maintenance or repair of equipment integral to the loading and unloading processes.* Nevertheless, Petitioner's statement of facts now contains numerous mischaracterizations that falsely seek to create the impression that the switchyard crew itself assisted in the process of transferring cargo from rail cars to maritime vessels, and vice versa.

These misstatements include that, "Coal dock workers and the Harbor Yard workers load coal onto the ships" (Petitioner's Brief, p. 7); that "yard engineers . . . are directly involved in the loading of coal onto ships" (Petitioner's Brief, p. 9); and that, after the road crews drop the cars off at the Harbor Yard, the "'[s]witchyard crews' then begin the assembly of cars for unloading into ships at the dock." (Petitioner's Brief, p. 7.)

What is particularly disingenuous about these statements is that they enable Conrail inaccurately to argue that this case is on point with other cases where railroad workers were covered by the LHWCA, when, in those cases, the railroad crews actually maneuvered the freight cars onto maritime vessels. *See, e.g,*

Pennsylvania Railroad Co. v. O'Rourke, 344 U.S. 334 (1952); *Conligio v. Norfolk & Western Ry. Co.*, 670 F. Supp. 1353 (E.D. Mich. 1987); *Richards v. Norfolk & Western Ry. Co., unreported*, No. 86-CV-74028-DT (E.D. Mich. 10/30/87); *Sixbey v. Norfolk & Western Ry. Co., unreported*, C.A. No. 87-CV-60145-AA (E.D. Mich. 4/4/88); and *Patterson v. CSX Transportation, Inc., unreported*, Case No. 921044 (Va. S .Ct. 4/16/93).

Here, by contrast, Respondent's switchyard crew performed no similar function directly or integrally concerned with the loading and unloading of ships; *they never loaded railroad cars or cargo onto maritime vessels;* they simply spotted empty or full cars at the docking company's facility, and pulled them away after docking company employees had loaded or unloaded them.

Other vivid mischaracterizations by Petitioner include its reality-distorting argument that the hauling of freight cars, which are subsequently overturned by docking company employees during the unloading process, itself constitutes the "operation" of equipment essential or integral to the loading and unloading process; and the statement that the switchyard crew "spot[s], assemble[s] and move[s] cars into... the dumper," (Petitioner's Brief, p. 7), making it sound as if "spotting" is the first, rather than the last, stage in the process of delivering the coal cars to the custody of docking company employees.

The numerous mischaracterizations of the Sixth Circuit's majority opinion will be dealt with in the ensuing portions of this brief.

REASONS FOR DENYING THE WRIT

I.

SUMMARY OF ARGUMENT

There is no inconsistency between the Sixth Circuit's ruling and the cases cited by Petitioner. *Respondent's duties at the docking company situs were solely a delivery function having nothing to do with loading and unloading;* the switchyard crew merely delivered full or empty freight cars and returned to pick them up after they had been loaded or unloaded by dock company workers.

The Sixth Circuit's conclusion that this did not constitute "maritime employment" is fully consonant with the congressional intent to exclude from coverage persons present at a maritime situs solely to drop off or pick up cargo. This is the reason it is significant that the switchyard crew's duties at the Harbor Yard were the same as they would be at any other switchyard. Although their interaction with the recipient of the cargo is necessitated by the act of delivering goods, the switchyard crew *remained affiliated with the land-based transportational system because they did not get involved in the loading and unloading process.* Their function was the first or last stage in the movement of cargo through the land-based stream of commerce before or after its delivery to, or receipt from, the stream of maritime commerce.

It will further be noted that Mr. Stowers was not injured on a "maritime situs", for purposes of 33 U.S.C. § 903(a), as the "back track" was never used for docking company operations, and the Harbor Yard is not a "marine railway" as that term is understood in the shipping industry. Likewise, the Conrail railroad operation by whom Mr. Stowers was employed is not a "maritime employer" for purposes of 33 U.S.C. § 902(4).

II.

THE SIXTH CIRCUIT'S HOLDING COMPORTS WITH THE LHWCA'S STATUTORY INTENT TO EXEMPT FROM COVERAGE WORKERS, SUCH AS RESPONDENT, WHOSE "RESPONSIBILITY ON THE WATERFRONT IS ESSENTIALLY TO PICK UP OR DELIVER CARGO UNLOADED FROM OR DESTINED FOR MARITIME TRANSPORTATION." *NORTHEAST MARINE TERMINAL CO., INC. V. CAPUTO,* 432 U.S. 249 (1977).

The Congressional History of the 1972 amendment to the LHWCA, and the case law interpreting it, clearly reveal that Congress never intended LHWCA coverage to apply to switchyard engineers such as Mr. Stowers whose sole function at the dock is to drop off or pull away freight cars which the maritime workers employed by the docking company are responsible to load and unload.

Although, in the statute itself, Congress did not expressly define the term "maritime employment,"[5] the legislative history indicates that persons acting as delivery agents from the land-based transportational system were never intended to be covered:

> The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by the Act for part of their activity. To take a typical example, cargo, whether in break bulk or containerized form, is typically unloaded

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5. The statute defines an "*employee*" as a "*person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations,* and any harbor worker including a ship repairman, shipbuilder, and shipbreaker. . . ." 33 U.S.C. § 902(3).

> from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters or on the adjoining land area. *The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity. Thus, employees whose responsibility is only to pick up stored cargo for further transshipment would not be covered.*

S. Rep. 13, H.R. Rep. 10-11, U.S. Code Cong. & Admin. News 1972, p. 4708 (emphasis added). (App. 3a-5a).

The judicial interpretation of this history remains faithful to the distinction between delivery functions and functions involving loading and unloading.

Thus, in the seminal case of *Northeast Marine Terminal Co.. Inc. v. Caputo,* 432 U.S. 249 (1977), the Court, interpreting the above-quoted passage, concluded that

> . . . [t]he example also makes it clear that persons who are on the situs but are not engaged in the overall process of loading and unloading vessels are not covered. Thus, *employees such as truck drivers, whose responsibility on the waterfront is essentially to pick up or deliver cargo unloaded from or destined for maritime transportation are not covered.*

Id., at 267 (emphasis added).

This distinction was again recognized in *P.C. Pfeiffer Co., Inc. v. Ford,* 444 U.S. 69 (1979). In *Pfeiffer,* one of the workers was injured while fastening military vehicles onto railroad flatcars; the other was injured while unloading cotton from a draywagon into a pier warehouse for later loading onto maritime vessels. While finding that these workers were covered by the LHWCA, as their duties were typical longshoreman tasks of loading and unloading cargo, the Court reiterated that there is a critical distinction between loading/unloading and delivery functions:

> There is no doubt for example, that *neither the driver of the truck* carrying cotton to Galveston *nor the locomotive engineer transporting military vehicles from Beaumont was engaged in maritime employment even though he was working on the marine situs. Such a person's 'responsibility is only to pick up stored cargo for further trans-shipment.'*

Id., at 83 (emphasis added).

In the instant case, the function of the switchyard crew was essentially the same as that of the truck drivers or the locomotive engineer mentioned in *Pfeiffer* and *Caputo.* In each instance, the transportation workers are merely engaged in picking up or delivering cargo as part of the process of overland transportation. As such, Congress expressly did not intend for them to be covered by the LHWCA.

III.

THE SIXTH CIRCUIT'S HOLDING IS NOT INCONSISTENT WITH CASES WHICH FIND RAILROAD WORKERS TO BE COVERED BY THE LHWCA WHEN THE TASKS THEY PERFORM ARE DIRECTLY AND INTEGRALLY RELATED TO THE LOADING AND UNLOADING OF MARITIME VESSELS.

Cases cited in Petitioner's Brief as being inconsistent with the Sixth Circuit's holding are inapposite as involving either direct loading by railroad workers of freight cars onto maritime vessels, or the repair and maintenance of structures and equipment integral to the loading/unloading process.

The three cases which Petitioner reproduces in its Appendix (App. A38-A68) fall into the "direct loading" category. Thus, in *Patterson*, a railroad switch operator was deemed a "maritime employee" when he was injured while uncoupling cars for direct loading onto a barge where a member of his crew was waiting *on the barge* to receive them. Likewise, in *Sixbey*, a railroad conductor was found to be engaged in "maritime employment" when he "was injured while engaged in the process of moving cars *onto a barge* for shipment across the Detroit River." (App. A47). Again, in *Richards*, the injured plaintiff "was operating a locomotive on dry land, moving railroad cars directly *onto a barge* for delivery in Windsor." (App. A52).

Indeed, it should be noted that, even before the 1972 amendment, these "direct loading" employees were covered by the LHWCA when their injuries occurred during the portion of the loading/unloading process while they were on or over navigable waters. *See, e.g., Pennsylvania Railroad Co. v. O'Rourke*, 344 U.S. 334 (1953). The 1972 amendment expanded this coverage to include the shoreward aspect of the direct loading process when it was indeed a continual loading/unloading process by the railroad

crews. As noted previously, this is simply not the scenario in the case *sub judice,* as the railroad crew merely spotted the loaded/unloaded cars at the docking company facilities for the docking company workers, alone, to load or unload. In short, the direct loading cases are completely inapposite to this case.

Likewise, the other railroad worker cases cited by Petitioner are critically dissimilar from the facts here. In this respect, there is no merit to Petitioner's contention that the Sixth Circuit refused to follow the Supreme Court's holding in *Chesapeake & Ohio Railway Co. v. Schwalb,* 493 U.S. 40 (1989).

Granted, in *Schwalb,* the injured workers were employees of railroad companies, and the facilities they serviced were coal dock operations, but the factual similarities between the consolidated cases in *Schwalb* and the case *sub judice* ends there. In *Schwalb,* the workers' duties included the repair or maintenance of equipment *used in the loading and unloading process.* Two of the injured workers cleaned spilled coal from the trunion rollers which activated the mechanical dumper and from underneath the conveyor belts used to shuttle coal from the dumper to its maritime destination. The pier machinist in the companion case of *Norfolk & Western Railway Co. v. Goode,* 493 U.S. 40 (1989) maintained and repaired the dumpers and conveyor belts, and was injured while repairing a retarder on the dumper.

There is no question that the equipment these workers serviced was integral to the loading/unloading process; and that, had they been injured while *operating* this equipment, they would have been covered as workers whose duties modern technologies moved inland. *See, Caputo.* Nevertheless, as these workers were not engaged in the actual loading/unloading process, the appellate courts prior to *Schwalb,*[6] and the Supreme Court in *Schwalb,*

6. As noted in Justice Stevens' concurrence in *Schwalb,* prior to *Schwalb,* "the Federal Courts of Appeals . . . consistently interpreted the Act's status requirement to encompass repair and maintenance workers." 493 U.S. at 51.

needed an analytic tool to conceptualize the relation of these workers to the overall loading/unloading process, to determine whether they were workers Congress intended to cover. Hence, the "but for" language used in *Schwalb* to describe how their function was integrally related to the loading/unloading process; hence, in *Schwalb*, and its precursors, the continual admonishment to liberal construction to achieve the statute's broad remedial intent.[7]

What *Schwalb* and the other repair and maintenance cases stand for, then, is the proposition that *repair and maintenance of equipment used to load and unload maritime vessels is tantamount to operation of that equipment for purposes of the LHWCA's definition of "maritime employment."* These are classes of limbo workers whom Congress intended to benefit by extending coverage inland; these are workers who are justly described as subordinates to the maritime transportation system. *Delivery persons from the land-based transportational system such as the switchyard crew, sub judice, on the other hand, simply do not fall within the factual parameters of Schwalb and the other repair and maintenance cases.* As noted in *Schwalb*, the test of LHWCA coverage is always, "an occupational test focusing on loading and unloading." As noted in *Pfeiffer* and *Caputo*, delivery functions

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7. Liberal construction, however, cannot be equated with fanatical application of rules to circumstances to which, realistically, they do not pertain. A rule of liberal construction serves as a tie-breaker for those nebulous functions that are not quite longshoring, but are subsidiary to it, such as repairing and maintaining equipment essential to the loading/unloading process. The delivery service performed by agents of the land-based transportational system, however, is not such a nebulous function. In amending the LHWCA, Congress "did not see itself as including under the Act whole new groups and classes of employees." *Stockman v. John T. Clark & Son of Boston Inc.*, 539 F.2d 264, 276 (1st Cir. 1976), *cert. denied*, 433 U.S. 908 (1977). Thus, as noted in *Schwalb*, although "the 1972 amendments were to be liberally construed... [to] cover[] all those on the situs involved in the essential or integral elements of the loading or unloading process...[,] *those on the situs not performing such tasks are not covered.*" *Id.*, at 46.

performed by emissaries of the land-based transportational system are not a part of the loading and unloading process. As noted in *Sea-Land Service, Inc. v. Dir. Office of Workers' Compensation Programs, etc.*, 540 F.2d 629 (3rd Cir. 1976),

> *The line which Congress intended to draw was between maritime commerce and land commerce, and the coverage of the federal law starts at the point where the cargo passes from an employer engaged in the former to an employer engaged in the latter.* That the one employer may be engaged in both types of commerce is irrelevant. The line should still be drawn where cargo is delivered to a segregated place for delivery to the next mode of transportation.

Id., 540 F.2d at 639 (emphasis added).[8]

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8. Contrary to Petitioner's argument, this distinction does not revive the defunct point-of-rest doctrine. That doctrine was concerned, not with the functional significance of the worker's duties, but with the artificial test of the point at which cargo first came to rest before or after its contact with the maritime vessel. Here, on the other hand, the distinction analyzes job duties in relation to which system of transportation the injured worker services — an analysis which clearly implements the congressional intention of covering only those workers engaged in "maritime employment."

IV.

THE SWITCHYARD CREW'S FUNCTION OF "SPOTTING" FULL FREIGHT CARS AT THE DUMPER, AND PULLING AWAY EMPTIES AFTER THE DOCKING COMPANY EMPLOYEES HAVE UNLOADED THEM, CANNOT SOUNDLY BE CHARACTERIZED AS THE "OPERATION" OF EQUIPMENT ESSENTIAL TO THE LOADING AND UNLOADING PROCESS.

There is further no merit to Petitioner's claim that the switchyard crew's delivery function is in reality a loading and unloading function simply because the coal cars themselves are subsequently overturned (by coal dock company employees) in the unloading process that takes place in the dumphouse.

The "delivery" vs. "loading/unloading" distinction cannot be avoided through such absurd manipulation of terms. The fact remains that this switchyard crew does not operate (or repair or maintain) the mechanical equipment used to overturn coal cars in the dumper; it does not operate (or repair or maintain) the conveyors that shuttle the coal to storage for later conveyance to maritime vessels. The switchyard crew merely drops off and picks up the full or empty freight cars brought in by its over-the-road crews. Conrail itself has organized its operations such that the switchyard crew and the over-the-road crews are part of the same land-based transportational system, whose orders emanate from the yard master and train master out of the railroad facility. Conrail for its corporate purposes set up a separate corporate entity to run the docking operation, with separate facilities, separate supervisors, and separate employees, who handle all aspects of the loading/unloading operation, including repair and maintenance of that equipment. It is therefore ironic (if not disingenuous) for Conrail to now be contending that its railroad operation is

"intertwined" in function with its coal dock company.[9] In point of fact, it set up those operations to function as *distinct entities who interact by contract* as they would with any other independent business entity — as they do with the Penney Dock Company, or with Chrysler, Ford, or the Cleveland Electric Illuminating Company.

That railroad freight cars are overturned in the dumping process while they are being unloaded by docking company employees does not make those cars "equipment" used to load or unload maritime vessels. Railroad freight cars *being hauled and delivered by switchyard or* over-the-road crews are merely cargo holders being borne through the land-based stream of commerce.

Indeed, Petitioner's characterization of the facts directly contravenes the *Pfeiffer* and *Caputo* examples quoted earlier. Consistent application of Petitioner's logic would require the conclusion that the locomotive engineer hauling freight out of the maritime situs in *Pfeiffer,* or the truck drivers picking up cargo at the maritime situses in *Pfeiffer* and *Caputo,* were all engaged in the "operation" of equipment essential to the loading/unloading of maritime vessels. In each of those instances, the vehicle that

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9. Likewise, Conrail's harping on the need for liberal construction in favor of the "thousands of railroad workers at marine railway facilities . . . [who] will be denied coverage" under the Sixth Circuit's ruling, must be viewed with a skeptical eye. *The only party who stands to suffer (thouqh not unfairly) from the Sixth Circuit's ruling is Conrail who perceived in Schwalb and similar cases a possible loophole for avoiding its FELA liability to railroad workers such as Mr. Stowers!* Furthermore, these are *not* railroad workers at a "marine railway" facility. *See* discussion of "marine railway" *infra,* pp. 26-27.

Conversely, the failure to affirm the Sixth Circuit's ruling would indeed effect an unjust deprivation of the rights of Mr. Stowers, and similarly-situated railroad workers, who, without engaging in the loading and unloading process, would *lose their rightful FELA coverage intended for them by Congress* to a system of workers' compensation coverage intended for longshoremen.

reentered the land-based transportational system had been entered or otherwise utilized by LHWCA-covered workers during the loading/unloading process. But clearly, under *Pfeiffer, Caputo,* and the congressional history itself, *coverage of the delivery workers under the LHWCA was not intended, regardless of what happens to the vehicle or its contents while it is in the possession of the maritime workers.*

Again, the focus must be on the function of the injured worker vis-a-vis the loading/unloading operation. Just as the worker who fastens a military vehicle onto a flatbed car is a "maritime employee," while the locomotive engineer who hauls that same train out of the maritime situs is not, *see Pfeiffer*; so, too, the coal dock employees who overturn the coal cars in the mechanical dumper are "maritime employees," while the switchyard crew that "spots" those cars at the dumper, then subsequently hauls them away, are not "maritime employees."

V.

THE SIXTH CIRCUIT DID NOT ERR IN RELYING ON *CONTI V. NORFOLK & WESTERN RAILWAY CO.*, 566 F.2D 890 (4TH CIR. 1977).

Petitioner's description of the Sixth Circuit's majority opinion, especially with respect to its reliance on *Conti v. Norfolk & Western Railway Co.*, 566 F.2d 890 (4th Cir. 1977), does not provide a fair statement of the reasons the Sixth Circuit ruled as it did.

Both *Conti* and the case *sub judice* involve railroad workers employed in a harbor yard servicing a coal dock facility. The workers in *Conti* were two brakemen and one brakeman-conductor. As here, in *Conti,* the railroad workers neither had occasion to go aboard the pier or maritime vessels, nor to operate (or repair or maintain) the equipment used in the loading/

unloading process. As here, the railroad workers in *Conti* were sometimes assigned duties outside the harbor yard, and were always "governed by the same operating and safety rules as other brakemen, conductors and engineers." *Conti*, 566 F.2d at 892. Under these circumstances, the Court in *Conti*, and the Sixth Circuit below, found that the railroad workers were not engaged in "maritime employment" as they,

> (1) were "not engaged in an 'integral part of the unloading process'"; and
>
> (2) performed tasks of a "traditional railroad" nature rather than of a "traditional maritime" nature.

Conti, 566 F.2d at 895; *Stowers*, 985 F.2d at 296.

It is also true that the Sixth Circuit, relying on *Conti*, found a "meaningful distinction" between "the unloading of a coal train, [and] loading [of] a vessel," *Id.*, at 296, but this finding must be understood in context. The Sixth Circuit did not deny that if the switchyard crew's function had involved loading/unloading tasks such as operating the mechanical dumper equipment or pushing freight cars onto maritime vessels, that function would have been "maritime employment." But that is not what the switchyard crew's duties involved. Rather, the Sixth Circuit expressly noted,

> *it is significant here that Stowers did not participate in the loading or unloading of the rail cars; he merely delivered the cars to the loading and unloading site, and later hauled them away.*

Id., at 296. (emphasis added.)

Thus, the "meaningful distinction" that the Sixth Circuit

found is the very same distinction recognized in *Pfeiffer* and *Caputo*: that between a delivery function emanating from the land-based transportational system and a loading/unloading function servicing the maritime system.

That this is the proper reading of *Conti*, and of the Sixth Circuit's opinion, is confirmed by the recent holding in *Hayes v. CSX Transportation, Inc.*, 985 F.2d 137 (4th Cir. 1993). In *Hayes*, while the Fourth Circuit found that a railroad worker who was injured at the maritime situs while assisting crane operators in unloading a ship's cargo to railroad cars was engaged in "maritime employment," the court reaffirmed its holding in *Conti* and distinguished *Conti* on its facts:

> As we explained in *Vogelsang v. Western Maryland Railway Co.*, 670 F.2d 1347, 1348 (4th Cir. 1982), the employees in *Conti* were not engaged in an integral part of the loading or unloading process. *They were engaged in moving the train.* Hayes, however, was engaged in employment of a traditionally maritime nature because his duties in directing the crane and fastening the cargo were an integral part of the ship unloading process. *Therefore, Conti is not applicable to the facts presently in this appeal.*

Id., at 142-143 (emphasis added). Indeed, virtually every case that has cited *Conti*, including *Harmon v. Baltimore & Ohio Railroad*, 741 F.2d 1398 (D.C. Cir. 1984) which Petitioner and the dissenting judge below have cited as directly conflicting with the instant case, have distinguished *Conti* on its facts. Thus, in *Harmon*, the court stated:

> The court [in *Conti*] held the railroad brakemen who worked in a shipyard were not covered by

> LHWCA because the employment was identical to that of railroad brakemen everywhere... In the instant case, because Harmon worked on equipment that was an integral part of loading and unloading operations, his job had a significant relationship to traditional maritime activities. In that sense, Harmon was engaged in the type of duties that longshoremen perform in transferring goods between ships and land transportation. *Thus Conti is inapposite.*

Harmon, 741 F.2d at 1404, (emphasis added). *See also, Price v. Norfolk & Western Ry. Co.*, 618 F.2d 1059, 1062 (4th Cir. 1980); *Vogelsang, supra; and Richards, supra.*

Thus, far from being in conflict with the analytic framework of *Caputo, Pfeiffer, Schwalb,* or any of the Circuit opinions following those cases, the Sixth Circuit's holding below, and the holding in *Conti,* recognize a valid distinction between delivery and loading/unloading functions, a distinction thus far recognized by this Court.

VI.

THE BACK TRACK WHERE RESPONDENT WAS INJURED IS NOT A "MARITIME SITUS"; AND THE HARBOR YARD IS NOT A "MARINE RAILWAY."

Although the Sixth Circuit reversed the District Court's holding based solely on the majority's finding that Respondent was not a "maritime employee," Respondent further asserts that he was not injured on a "maritime situs," and his employer was not a "maritime employer" for purposes of the LHWCA.

The LHWCA's "situs" requirement is met if the injury occurs

> upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, *marine railway,* or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel.)

33 U.S.C. § 903(a) (emphasis added).

In the case *sub judice,* Petitioner contends, and the dissenting judge erroneously agreed, that Mr. Stowers' injury at the Harbor Yard's "back track" satisfies the "situs" requirement because the Harbor Yard constitutes a "marine railway." 985 F.2d at 298. This finding, however, does not accord with the definition of "marine railway" as understood in the industry, or as described in LHWCA cases addressing that term.

It is well-settled that a "marine railway" is a dry dock used for hauling maritime vessels out of the water in order to repair them.

> Technically, a dry dock is a watertight basin which after pumping out allows examination and work upon the bottom of a vessel. A graving dock, except for details of construction, is the same. A floating dock receives a vessel when the dock is submerged, after which the watertight compartments of the dock are pumped out and the buoyancy of the dock raises the vessel. *A marine railway is an inclined structure at the water's edge which extends below the water. It carries a cradle which moves on rollers or wheels. The cradle runs below the water and receives the vessel which is then hauled out.* Bradford, Glossary.of Sea Terms, "Dry Dock," "Railway."

Maryland Casualty Co. v. Lawson, 101 F.2d 732, 733 (5th Cir. 1939) (emphasis added). Thus,

> [i]n nautical parlance 'dry dock' 'floating dock' and 'marine railway' are interchangeable terms. Necessarily, all are located on navigable waters and used for exactly the same purposes, i.e., to raise a ship out of the water to permit examination and repairs to her hull which are impossible while she is afloat.

Id.; accord, Avondale Marine Ways v. Henderson, 346 U.S. 366, 367 (1952), Douglas, J., *concurring; St. Louis Shipbuilding v. Dir. of Office of Workers' Comp., etc.,* 551 F.2d 1119, 1122-1123 (8th Cir. 1977); *Union Shipbuilding Co. v. Boston Iron & Metal Co.,* 17 F. Supp. 318, 319 (D. Md. 1936).

Here, there is no question that the Harbor Yard is *not* a "marine railway" as that term is understood in the shipping industry. The Harbor Yard was merely a switchyard facility servicing two docking companies. There is no evidence (or even any allegation) that the Harbor Yard had tracks running into the water to pull out maritime vessels for repair. "Marine railways" have nothing to do with this case.

The "back track" area of the Harbor Yard, moreover, does not otherwise satisfy the definition of "maritime situs" for purposes of the LHWCA, as it was not "an area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel." 33 U.S.C. § 903(a). Indeed there is not a shred of evidence in the record (or contention by Petitioner) that any equipment used to load or unload maritime vessels was housed or repaired anywhere on the premises of the Harbor Yard.

The "back track" was an area of the Harbor Yard farthest from the harbor. It was never used by the dock company employees for any purpose. It was used solely by railroad employees for the standard railroad functions of train classification and bad-order set off.

Contrary to Petitioner's contention, the functions of train classification and bad order set off are not part of the overall loading and unloading process, but are solely related to overland transportation. The switchyard crew's duties here were materially different from the duties of the railroad crews in *Patterson, Sixbey, Richards,* and *Conligio,* where the railroad crews were engaged in loading freight cars directly onto barges. In those cases, the railroad crews' activities on dry land, such as coupling of cars for subsequent loading onto vessels, were deemed to occur on maritime situses, even if those situses were not directly adjacent to the shore, because the functions performed there were part of a *continuous process,* in which the railroad workers were directly involved, of loading freight cars onto maritime vessels. Here, on the other hand, none of the freight cars "spotted" by Respondent and his crew were loaded by anyone onto maritime vessels.

VII.

THE RAILROAD COMMON CARRIER (CONRAIL) BY WHOM RESPONDENT WAS EMPLOYED WAS NOT AN "EMPLOYER" FOR PURPOSES OF THE LHWCA.

Finally, an employee is not covered by the LHWCA if his employer does not meet the definition of "employer" as set forth in 33 U.S.C. § 902(4). Here, the railroad common carrier for whom Mr. Stowers worked does not meet that definition.

Under 33 U.S.C. § 902(4), an "employer" must have one or more employees who possess "maritime status" and are employed, in whole or part, at a "maritime situs." 33 U.S.C. §§ 902(4), 904.

Here, the railroad common carrier (Conrail) does not satisfy this definition, as *none of the railroad employees had "maritime status."* As noted earlier, Conrail had formally arranged to keep its railroading and docking company corporate operations separate. The docking company was a separate legal entity, with separate employees, separate supervisors, separate facilities, and a separate purpose. The docking company performed all the loading and unloading operations, as well as all the maintenance of equipment used in those operations. The railroad workers, on the other hand, performed solely the delivery function of dropping off and picking up full or empty railroad cars at the docking company's facilities. As such, the railroad common carrier by whom Mr. Stowers was employed had no employees who engaged in "maritime employment," and Petitioner was not an "employer" for purposes of the LHWCA.

CONCLUSION

Respondent respectfully contends that the evidence adduced does not establish Petitioner's entitlement to summary judgment on the issue of subject matter jurisdiction. The Sixth Circuit below correctly held that the District Court erred in granting Summary Judgment. Respondent's Complaint and evidence was more than sufficient to meet his burden of establishing a prima facie FELA claim for relief within the subject matter jurisdiction of the District Court. *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986). For Petitioner to prevail, the evidence must establish as a matter of law all three elements necessary to classify Respondent as covered by the LHWCA rather than the FELA. These elements are: (1) "maritime employment"; (2) maritime situs; and (3) a "maritime employer." In fact, the evidence submitted establishes a total want of *any* of these elements. The Sixth Circuit correctly remanded this case for trial on the merits. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A — 45 U.S.C. §§ 51, 56

§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

§ 56. Actions; limitations; concurrent jurisdiction of courts

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Appendix A

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

APPENDIX B — EXCERPTS FROM THE CONGRESSIONAL HISTORY OF THE 1972 AMENDMENT TO THE LHWCA, U.S. CODE CONG. & ADMIN. NEWS 1972, PP. 4707-4708

EXTENSION OF COVERAGE TO SHORESIDE AREAS

The present Act, insofar as longshoremen and ship builders and repairmen are concerned, covers only injuries which occur "upon the navigable waters of the United States." Thus, coverage of the present Act stops at the water's edge; injuries occurring on land are covered by State Workmen's Compensation laws. The result is a disparity in benefits payable for death or disability for the same type of injury depending on which side of the water's edge and in which State the accident occurs.

To make matters worse, most State Workmen's Compensation laws provide benefits which are inadequate; even the better State laws generally come nowhere close to meeting the National Commission on State Workman's Compensation Laws recommended standard of a maximum limit on benefits of not less than 200% of statewide average weekly wages. The following are the maximum limits on the compensation payable for permanent total disability in some maritime States:

California	$70.00
Florida	56.00
Hawaii	112.50
Louisiana	49.00
Maryland	85.68
Massachusetts	[1]77.00
New Jersey	101.00
New York	80.00

1. Plus $6 for each dependent.

Appendix B

Oregon	62.50
Pennsylvania	60.00
Texas	49.00

Also, under the laws of some states due to exemptions based upon the number of employees hired some workers might be uncovered in the event they are unfortunate victims of an injury.

It is apparent that if the Federal benefit structure embodied in Committee bill is enacted, there would be a substantial disparity in benefits payable to a permanently disabled longshoreman, depending on which side of the water's edge the accident occurred, if State laws are permitted to continue to apply to injuries occurring on land. It is also to be noted that with the advent of modern cargo-handling techniques, such as containerization and the use of LASH-type vessels, more of the longshoreman's work is performed on land than heretofore.

The Committee believes that the compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstance of whether the injury occurred on land or over water. Accordingly, the bill would amend the Act to provide coverage of longshoremen, harbor workers, ship repairmen, ship builders, shipbreakers, and other employees engaged in maritime employment (excluding masters and members of the crew of a vessel) if the injury occurred either upon the navigable waters of the United States or any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other area adjoining such navigable waters customarily used by an employer in loading, unloading, repairing, or building a vessel.

The intent of the committee is to permit a uniform compensation system to apply to employees who would otherwise

be covered by this Act for part of their activity. To take a typical example, cargo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area. The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity. Thus, employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo. However, checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment. Likewise the Committee has no intention of extending coverage under the Act to individuals who are not employed by a person who is an employer, i.e. a person at least some of whose employees are engaged, in whole or in part in some form of maritime employment. Thus, an individual employed by a person none of whose employees work, in whole or in part, on navigable waters, is not covered even if injured on a pier adjoining navigable waters.

APPENDIX C — EXCERPTS FROM THE AFFIDAVIT OF GEORGE R. STOWERS

IN RE: GEORGE R. STOWERS

STATEMENT UNDER
OATH OF GEORGE R. STOWERS
TAKEN AT THE OFFICES OF
NURENBERG, PLEVIN, HELLER
& McCARTHY FIRST FLOOR, STANDARD BUILDING
CLEVELAND OHIO, ON TUESDAY
DECEMBER 24, 1991
AT 1:30 P.M.

QUESTIONS BY: MARSHALL I. NURENBERG, ESQ.
NURENBERG, PLEVIN, HELLER
& McCARTHY
FIRST FLOOR, STANDARD BUILDING
CLEVELAND, OHIO 44113

ANSWERS BY: GEORGE R. STOWERS

REPORTED BY: ANETA I. FINE, RPR

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FAX 621-0050
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* * *

[12] Q. Now, the kind of cars that you bring in to the coal dock, are they what would be called coal hopper cars? A. Yes.

Appendix C

Q. And was there a track at the coal dock which might be called a dumper track? Maybe they use a different name for it? A. Yes. Where you put it into the machine I would say would be the dumper track.

Q. Now, when you bring cars in to the dumper track, do you spot the lead car so that it's by the dumper ready to be dumped? A. Well, if we're shoving a train down to the dumper it would be the rear car.

Q. All right. The hind car? A. The hind car.

Q. Then what do you do with your engine? A. Then we cut off and go to another track. Sometimes we push 40, 50 cars down to there and stop.

Q. All right. How do the cars then get moved along the dumper track so that each car can be dumped for loading purposes? [13] A. They're done with probably a mule or a machine, I imagine, pulls.

Q. But is there separate equipment operated by the coal dock and employees of the coal dock? A. Yes. They take care of the dumping.

Q. Once you bring a string of cars — let me put it a different way. When the road crews bring the cars in, where do they leave the cars, in what area? A. Usually in the bridge area.

Q. Then do you take an engine and go to the bridge yard and pick up the loaded cars? A. Yes.

Q. You then transport the loaded cars to the track where they are to be dumped? A. Yes.

Appendix C

Q. At that point is your work done and it's up to the coal dock people to move the cars and dump them and get them into the ships? A. Yes.

Q. Do the crew of the switching operation like YIAS 11, do they have anything to do with the equipment that is used to dump the cars? A. No. Outside of the cars, pushing the cars.

Q. Yes. Once you spotted the cars is that the end [14] of your work? A. Yes. We're done. We're done.

Q. Would it be a fair description of your work as far as the coal dock operation is concerned, that you pick up loaded cars that are brought in by a road crew, bring them down to the coal dock, and then pick up empty cars and take them back to a place where the road crew can pick them up? A. Yes.

Q. Is the job then of your crew one of transportation of loads to the coal dock and empties from the coal dock to where they can be picked up? A. Yes.

Q. Are you directly concerned in your job with either the loading or unloading of ships as distinguished from transporting cars to be loaded or unloaded? A. I don't —

Q. All right. To get the cars loaded, I mean, sorry, to get the ships loaded? A. Yes.

Q. The cars have to be moved along the track, dumped by special equipment, and then in some [15] way through a series I guess of conveyors loaded onto the ship. Is that basically correct? A. Yes.

Appendix C

Q. Do you people have anything to do with that kind of work at all? A. We just spot the car and put it up.

Q. That's what I'm saying. A. We don't have nothing to do —

Q. You don't work the mechanical arm that moves the cars along the track? A. No.

Q. You don't dump the cars? A. No.

Q. You don't have anything to do with the maintenance of any of the equipment that is used to dump the cars or get the, I'm sorry, I mean dump the coal and get the coal actually onto the ship itself? A. No.

Q. And of course you don't do any maintenance work on any of the equipment, do you? A. No. No.

Q. Now, with regard to the other facility which is the Pinney Dock company, is that correct? A. Yes.

[16] Q. Now, is that facility primarily concerned with iron ore? A. Yes.

Q. Again, do you have anything to do with the loading of the iron ore into the cars? A. No.

Q. Is that all done by employees at the Pinney Dock company? A. Yes.

Q. And do they have special equipment for that purpose? A. Yes.

Appendix C

Q. Do they get the ore from the ships and load it into the ore cars? A. Yes, and then they have piles of ore there stored that they sometimes do that, you know, if they have an order for a certain kind they have it laying there in the piles and they do that themselves. We don't do it.

Q. Then do you pick up the loaded cars and simply take them to a track where they can eventually be picked up by a road crew? A. Yes.

Q. And likewise, do you take empties down to the Pinney Dock so that they can be loaded for later [17] pickup? A. Yes.

Q. Is your work, does your work involve anything other than moving either loaded or empty cars from one point to another? A. That's all about it involves.

Q. Is all of the actual loading and unloading of either the coal or the ore then done by people employed by the dock companies? A. Yes.

Q. Either the coal dock company or the Pinney Dock company? A. Yes.

* * *

APPENDIX D — EXCERPTS FROM THE DEPOSITION OF CARL ENGLUND

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO - EASTERN DIVISION

JUDGE ALDRICH
CASE NO. 1:91 CV 1022

GEORGE R. STOWERS,

Plaintiff,

-vs-

CONSOLIDATED RAIL CORPORATION

Defendant.

Deposition of *CARL ENGLUND,* taken as if upon cross-examination before Linda A. Astuto, a Registered Professional Reporter and Notary Public within and for the State of Ohio, at the offices of Nurenberg, Plevin, Heller & McCarthy, 1st Floor Standard Building, Cleveland, Ohio, at 10:00 a.m. on Monday, December 9, 1991, pursuant to notice and/or stipulations of counsel, on behalf of the Plaintiff in this cause.

MEHLER & HAGESTROM
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Cleveland, Ohio 44115
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* * *

Appendix D

[24] Q. Well, what you use them for is to take them to some facility where they can either be dumped for loading or loaded to be taken out — well, strike that.

I don't think you do take out loaded coal cars from the dock company, do you? A. No.

Q. So they're really transported from what I'll call the receiving facility, if that's okay with you? A. Uh-huh.

Q. You call it, do you call it a receiving track or do you call it a storage track? I will use whatever term you normally use. A. We refer to the area as the bridge yard.

Q. All right. Then they're dropped off from the road in the bridge yard and then a yard crew's job is to take them from the bridge yard and transport them from the bridge yard down to the coal dock where coal dock people can then dump them, is that basically it? A. That's correct.

[25] Q. But all of the dumping itself is done by coal dock people, isn't that so? A. That's correct.

Q. Your people's job is simply to spot the cars so that they can be then thereafter handled by coal dock people? A. Yes. We spot them and we pull them away when they're empty.

Q. Right. Have you ever worked in any kind of an industrial switching job of any sort like Chrysler, Ford, CEI or any industrial facility that is serviced by Conrail? A. Not recently, no.

Q. But you've done it? A. Yes.

Appendix D

Q. Are you familiar with the kind of work that's done? A. Yes.

Q. And essentially what's done is that a Conrail crew takes loads and spots them where the industry wants them and then takes empties back out for basic reloading someplace, isn't that basically what an industrial job is? A. Yes, sir.

Q. And this job is essentially the same thing as [26] any other industrial switching job, isn't is? A. Which job, sir?

Q. The job you're doing for the coal dock company. All you're doing basically is spotting cars for unloading and pulling out empties? A. Yes. We are spotting loads and pulling empties, that's correct.

Q. A typical railroad switching yard in a yard facility, right? A. I wouldn't call Ashtabula Harbor typical, but yes, railroad switching, yes, sir.

Q. Now, do you have some communication with the supervisors of the dock company where they tell you what their needs are? A. Yes. The yard master and I both do. The yard master has a direct telephone to their office and the supervisors send messages either by fax or by picking up the phone.

Q. And what kind of information do they give you? A. It can be very specific or very general.

Depending on the type of boat that's there, they may want certain types of cars placed or he may just tell us that any low sulfur hydro you have can be put up. So we can be very generic or we can go by actual car number.

Appendix D

[27] Q. Are there some kind of mechanical facilities that the dock company uses for the unloading of the coal, something like a dumper of some sort? A. Yes, sir, there is.

Q. And is there more than one dumper? A. No. Just one.

Q. So each loaded coal car I guess has to go through the dumper, doesn't it? A. Yes.

Q. And who moves the cars then — strike that.

Is there a track adjacent to the dumper in some way so that the cars can be dumped? A. I don't follow you.

Q. Well, mechanically, I'm not familiar with it, I've never seen it, but the car obviously has to be spotted in some way in relation to the dumper in order to be dumped. A. Yes. The yard crew pushes it up into the dumper and they grab it with a set of retarders and hold it for a mechanical arm.

Q. Then all of that equipment is operated by coal dock people, correct? A. Yes, sir.

* * *

No. 92-1790

Supreme Court, U.S.
FILED
JUN 29 1993
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IN THE

Supreme Court of the United States

October Term, 1992

CONSOLIDATED RAIL CORPORATION,
Petitioner,

vs.

GEORGE R. STOWERS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

A. The Tasks Performed By Yard Crews At The Harbor Yard Are Part Of The Loading Process. 1

B. The Harbor Yard Facility Meets The "Situs" Requirement And Consolidated Rail Corporation Meets The Maritime "Employer" Status Requirement Under The Act 4

Supplemental Appendix:

Deposition of Carl Englund, p. 28..... A71

TABLE OF AUTHORITIES

Cases:

Chesapeake & Ohio Railway Co. v. Schwalb, 493 U.S. 40 (1989) 1,3

Merril v. Chicago & Illinois Midland Railway Co., 751 F. Supp. 770 (D.C. Ill. 1990) 4

Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977) 1

P.C. Pfeiffer Co., Inc. v. Ford, 444 U.S. 69 (1979) 2,3

Statutes:

33 U.S.C. §902(a) 5

33 U.S.C. §902(3) 5

33 U.S.C. §902(4) 4,5

33 U.S.C. §903(a) 4,5

No. 92-1790

IN THE

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GEORGE R. STOWERS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

REASONS FOR GRANTING THE WRIT OF CERTIORARI

A. The Tasks Performed By Yard Crews At The Harbor Yard Are Part Of The Loading Process.

The thrust of respondent's position is that the Harbor Yard railroad employees who actually work on (*i.e.* ride, operate, handle) the engine and loaded railroad cars are not engaged in "maritime employment" because their "sole function at the dock is to drop off or pull away freight cars", and, as such, they are merely "persons acting as delivery agents from land-based transportational [sic] systems [that] were never intended to be covered . . ." Respondent's Brief in Opposition, p. 13.

In an attempt to buttress this point, respondent quotes the observation of this Court in *Northeast Marine Terminal Co. v. Caputo,* 432 U.S. 249 (1977), reflecting on the Act's legislative history, that

> . . . employees such as truck drivers, whose responsibility on the waterfront is essentially to pick or deliver or cargo unloaded from or destined for marine transportation are not covered.

Id. at 267.

Respondent's comparison of the yard engineer's job tasks at the Harbor Yard Facility to those of a "truck driver", who merely delivers cargo "on the waterfront," is reality-distorting. The issue presented is whether respondent's job included tasks which are "an integral part of and essential to [the] overall processes [of loading and unloading a vessel.]" *Chesapeake & Ohio Railway Co. v. Schwalb,* 493 US. 40, 47 (1989). Even the Sixth Circuit majority opinion recognized that "workers

performing even one integral part of the loading or unloading process are covered by LHWCA." *Stowers*, Appendix 6, *citing to P.C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69, at 82 (1979).

Respondent's job tasks are hardly analogous to the "truck driver" example cited by respondent. The overland transportation of coal *ends* at the Harbor Yard when the coal-filled railroad cars are dropped off at the yard *by the over-the-road crews.* The "yard engineer" and his crew then have the responsibility of assembling the standing cars, moving them to the dockside dumper and physically spotting or pushing each car one at a time into the mechanical dumper, which then dumps the car's contents. This is not regular over-the-road transportation. It is the handling of bulk cargo at the dock as part of the process of loading a vessel. The yard engineer's task at the dumper is clearly "an integral part of" the loading process. The respondent himself conceded on deposition that the loading process would cease and the dumper become "plugged" if he did not do his job.[1]

The undisputed record is that yard crews at the Harbor Yard are responsible at the dockside mechanical dumper for operating a component part of the loading

---

[1] *See*, Petition at p. 9, App. A69-A70. Respondent's Brief in Opposition ignores this crucial and undisputed fact of record. In addition, respondent attempts to dispute the record reflected by the majority opinion itself—that yard crews at the Harbor Yard are responsible for "lock[ing] the coal-filled cars into [a] mechanical 'dumper.' " *Stowers*, Appendix 2. Respondent asserts this was simply a mistake of "confusing syntax" in the deposition testimony of train master Englund. There is no confusion. Indeed, respondent fails to point out that train master Englund confirmed in his deposition that the yard crews, including yard engineers, are often called upon to lock the coal-filled cars into the mechanical dumper.

(Footnote continued on following page.)

process—coal-filled rail cars which the yard crew assemble, move, spot and push into and then lock onto the mechanical dumper, which are then removed from the dumper by the yard crew after being emptied so that another car can be loaded and emptied. The issue is not whether the yard crew is actively engaged in the limited task of actually overturning the individual cars, but whether their job tasks constitute under *P.C. Pfeiffer* and *Schwalb* "some portion of that activity [that] is as much an integral part of the process of loading or unloading a ship . . . as a person who participates in the entire process." 444 U.S. at 82-83.

The Sixth Circuit's holding is, therefore, a departure from this Court's established analytical framework and rulings.

(Footnote continued from preceding page.)

> QUESTION: Does each of those cars then have to be moved through the dumper? ANSWER: Yes. The dumper only accepts one car at a time.
>
> QUESTION: What's the method by which the cars are moved in order to get them spotted next to the dumper? ANSWER: Well, there's two methods. The first one is with a mechanical arm which cuts the car—individually cuts the car away from the drag and pushes it into the dumper.
>
> QUESTION: That is strictly coal dock, right? ANSWER: Yes. The other way, when they have one of their numerous failures over there, we have yard crews actually shove the cars to the dumper one at a time. The crew does the dumping work and we had a period of time here back in the spring when we dumped with crews for almost 2 months.
>
> QUESTION: You mean your crew, in other words, would move the car through because the mechanical arm wasn't working? ANSWER: Yes, my crew did everything, they cut the cars, they spotted them on the cradle to be dumped and then they kicked them of. of there.

Englund Depo. p. 28, Supplemental Appendix A71-A72.

B. The Harbor Yard Facility Meets The "Situs" Requirement And Consolidated Rail Corporation Meets The Maritime "Employer" Status Requirement Under The Act.

Respondent also argues that he was not injured on a maritime "situs" and that petitioner, Consolidated Rail Corporation, is not a maritime "employer" under the Act, 33 U.S.C. §§902(4) and 903(a), respectively.

First, neither of these issues were directly addressed by the Sixth Circuit. Nevertheless, the majority opinion plainly implied that both tests were met in the record. *See,* Petition for Writ of Certiorari, p. 13 at footnote 5 and dissent of Judge Brown, 985 F.2d at 298.

In any event, it is clear that the record below satisfied both the "situs" and "employer" status requirements for coverage under the LWHCA. First, the Harbor Yard is a "marine railway" under 33 U.S.C. §903(a). Respondent's opposing brief wrongly equates the term "marine railway" under the 1972 Amendments with a "dry dock." This is plainly mistaken inasmuch as both sections 902(4) and 903(a) refer separately to a "marine railway" and a "dry dock." The tracks at the Harbor Yard clearly meet the "situs" test as a "marine railway." A "marine railway" has a broader meaning under the 1972 Amendments than a "dry dock." *See e.g., Merril v. Chicago & Illinois Midland Railway Co.,* 751 F. Supp. 770, 777-78 (C.D. Ill. 1990).

Second, the Section 903(a) "situs" requirement also includes any "other adjoining area customarily used by an employer in loading, unloading . . . a vessel." The tracks leading to and away from the dumper, including the "backtrack" area, where damaged cars from the loading process are "bad ordered," unmistakably meet

this separate "situs" test. The sole function of the Harbor Yard facility is to serve the loading and unloading of vessels operating on the Great Lakes. It is, therefore, an "adjoining area customarily used by an employer in loading [and] unloading . . . a vessel" under Section 902(a).

It follows from the above that Conrail's employment of a Yard Engineer engaged in "maritime employment" under Section 902(3) at a maritime "situs" under Section 903(a), qualifies Conrail as a maritime "employer" within the meaning of U.S.C. §902(4). This was clearly recognized by the Sixth Circuit majority opinion and dissent. Respondent's contention to the contrary is wholly insubstantial.

For all of the above reasons, it is respectfully requested that this Court grant the Writ of Certiorari to the Sixth Circuit Court of Appeals.

Respectfully submitted,

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[1] **SUPPLEMENTAL APPENDIX**

Case No. 1:91 CV 1022

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

GEORGE R. STOWERS,
Plaintiff,

vs.

CONSOLIDATED RAIL CORPORATION,
Defendant.

JUDGE ALDRICH

Deposition of CARL ENGLUND, taken as if upon cross-examination before Linda A. Astuto, a Registered Professional Reporter and Notary Public within and for the State of Ohio, at the offices of Nurenberg, Plevin, Heller & McCarthy, 1st Floor Standard Building, Cleveland, Ohio, at 10:00 a.m. on Monday, December 9, 1991, pursuant to notice and/or stipulations of counsel, on behalf of the Plaintiff in this cause.

* * * * *

[28] A. Once again it depends on what they've asked for.

Q. Does each of those cars then have to be moved through the dumper? A. Yes. The dumper only accepts one car at a time.

Q. What's the method by which the cars are moved in order to get them spotted next to the dumper? A. Well, there's two methods. The first one is with the mechanical arm which cuts the car—individually cuts the car away from the drag and pushes it into the dumper.

Q. That is strictly coal dock, right? A. Yes. The other way, when they have one of their numerous failures over there, we have yard crews actually shove the cars onto the dumper one at a time. The crew does the dumping work and we had a period of time here back in the spring where we dumped with crews for almost two months.

Q. You mean your crew, in other words, would move the car through because the mechanical arm wasn't working? A. Yes. My crew did everything. They cut the cars, they spotted them on the cradle to be dumped and then they kicked them off of there.

Q. Still the dumping would be done by the coal dock?

* * * * *